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## Constitutional Law: Retarded Justice: The Supreme Court's Subjective Standards for Capital Punishment of the Mentally Retarded

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## NOTES

# Compulsory Party Joinder and Tribal Sovereign Immunity: A Proposal to Modify Federal Courts' Application of Rule 19 to Cases Involving Absent Tribes as "Necessary" Parties

### *I. Introduction*

Because "[m]odern federal civil procedure stresses the virtues of avoiding multiple suits and potentially inconsistent verdicts,"<sup>1</sup> Rule 19 of the Federal Rules of Civil Procedure implements the doctrine of compulsory party joinder.<sup>2</sup> The rule seeks not only to "identify nonparties whose joinder is necessary for a just adjudication," but also to secure the joinder of such parties.<sup>3</sup> Thus, if an absent party is necessary for the disposition of the suit and joinder is "feasible," joinder of the party is compulsory. However, if the absent party is necessary and joinder is not feasible, Rule 19 requires dismissal if the party is deemed "indispensable."<sup>4</sup>

Numerous courts apply Rule 19 to bar suits in which Indian tribes are "indispensable parties" because of some tribal interest involved in the suit. "As separate sovereigns pre-existing the Constitution . . . Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."<sup>5</sup> Thus, joinder of an Indian tribe is not "feasible" unless the tribe has waived its immunity. Consequently, if the suit involves "tribal contractual, lease, property, or treaty rights, rights to govern the reservation, or the validity of tribal constitutional provisions," courts often declare the absent tribes "indispensable."<sup>6</sup> This finding requires

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1. Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1061 (1985).

2. FED. R. CIV. P. 19 (the title of Rule 19 is "Joinder of Persons Needed for Just Adjudication").

3. *Id.* at 1062.

4. FED. R. CIV. P. 19(b) ("If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable.").

5. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 58 (1978).

6. Timothy W. Joranko, *Tribal Self-Determination Unfettered: Toward a Rule of Absolute Tribal Official Immunity from Damages in Federal Court*, 26 ARIZ. ST. L.J. 987, 1009-10 (1994) (citations omitted).

dismissal under Rule 19, leaving plaintiffs without any available forum in which to seek relief.<sup>7</sup>

In *Citizen Potawatomi Nation v. Norton*,<sup>8</sup> the Tenth Circuit Court of Appeals affirmed the district court's dismissal of a suit for failure to join Indian tribes as indispensable parties under Rule 19.<sup>9</sup> The court held that the absent tribes were necessary and indispensable to the action,<sup>10</sup> but that it could not join them as defendants because of their sovereign immunity.<sup>11</sup> Therefore, although dismissal would leave the plaintiff with no available forum in which to seek relief, the court affirmed the district court's decision.<sup>12</sup>

This note first argues that many courts, including the *Citizen Potawatomi Nation* court, misapply Rule 19(b) in cases involving absent tribes as necessary parties and governmental agencies as defendants by giving insufficient weight to the federal government's ability, and duty, to represent the interests of absent tribes. Secondly, and perhaps most importantly, this note argues that litigants and courts overlook alternative procedural mechanisms that could resolve the majority of Rule 19 issues. Indeed, the interests served by Rule 19 are often better achieved through the use of these other mechanisms.<sup>13</sup> While problems may still arise where the litigants fail to employ these mechanisms, the Rule 19 application proposed herein would allow courts to consider the resulting prejudice to litigants when determining

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7. The remainder of this note focuses on courts' current applications of Rule 19 as denying plaintiffs a "legal remedy," i.e., the ability to have their dispute resolved by a court of justice. Although Rule 19(b) requires only that plaintiffs "have an adequate [alternative] remedy," see FED. R. CIV. P. 19(b), few courts have found that plaintiffs actually would have an adequate alternative remedy if the court dismissed the suit. See, e.g., cases cited *infra* note 121. Rather, a majority has found the opposite, focusing on the fact that the tribe's sovereign immunity bars the dispute in any forum. See, e.g., cases cited *infra* note 123. Even if a tribe would consent to suit in its tribal court, tribal court would not have jurisdiction over all parties involved. For example, the vast majority of cases involve suits against the U.S. government in which one or more absent tribes are deemed "necessary" and "indispensable" parties. In such cases, either the government or an absent tribe can assert its sovereign immunity, see *infra* Part III, to bar the suit in any tribal court. Indeed, as the majority of courts have acknowledged, the plaintiff actually has no "adequate remedy if the action is dismissed for nonjoinder." FED. R. CIV. P. 19(b). Therefore, this note's concern is that courts should afford the current litigants their day in court. It contends that certain procedural mechanisms are available that not only afford the current parties a "legal remedy" but also often better serve the interests of Rule 19.

8. 248 F.3d 993 (10th Cir. 2001).

9. *Id.* at 1002.

10. *Id.* at 999-1001.

11. *Id.* at 1001.

12. *Id.* at 1002.

13. See *infra* Part VI.B discussing the following procedural mechanisms: intervention, interpleader, and courts' ability to reserve jurisdiction over the original suit and transfer and consolidate subsequent suits.

whether to dismiss under Rule 19. As a result, courts could often allow plaintiffs' suits to proceed rather than simply dismissing them and forcing the plaintiffs to suffer the consequences.

Part II of this note outlines Rule 19 and its application in federal courts. Part III explains the doctrine of sovereign immunity and its applicability to Indian tribes. Part IV discusses the existing case law in which courts have applied Rule 19 to absent tribes. Part V outlines the facts, procedural history, holding, and reasoning of *Citizen Potawatomi Nation*. Finally, Part VI.A demonstrates that federal courts, like the *Citizen Potawatomi Nation* court, misapply Rule 19(b) by failing to give sufficient weight to the ability of governmental defendants to represent absent tribes' interests — an ability that may reduce or even eliminate the prejudice that the tribes might otherwise suffer. Part VI.B analyzes other procedural mechanisms that litigants and federal courts could employ to resolve the Rule 19 problems that arise in cases involving absent tribes as necessary parties.

## II. Rule 19 of the Federal Rules of Civil Procedure

### A. Rule's Purpose

Rule 19 stems from the equity principle providing that "a court of equity, once it undertakes a case, will not do justice 'by halves' but will seek to clean up the whole controversy."<sup>14</sup> The rule enables courts to adjudicate an entire dispute in a single action and to provide complete relief for the parties, thereby avoiding multiple, or piecemeal, litigation.<sup>15</sup> Indeed, compulsory party joinder works "to protect the interests of the parties by affording them a complete adjudication of their dispute" and also serves society's interest in "judicial economy by avoiding repeated lawsuits involving the same subject matter."<sup>16</sup> In fact, the rule serves "three classes of interests . . . : (1) the interests of the present [parties]; (2) the interests of potential but absent plaintiffs and defendants; [and] (3) [society's] interest in the orderly, expeditious administration of justice."<sup>17</sup> Basically, the rule seeks to ensure

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14. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 10.11 (5th ed. 2001); see also *Minnesota v. N. Sec. Co.*, 184 U.S. 199, 235 (1902) ("The general rule in equity is that all persons materially interested, either legally or beneficially, in the subject-matter of a suit, are to be made parties to it, so that there may be a complete decree, which shall bind them all."); *Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n*, 590 F.2d 1209, 1220 (D.C. Cir. 1978) ("[T]he concept of joinder was created to resolve the problem of conflicting exercise of equity jurisdiction."), *rev'd on other grounds sub nom. GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.*, 445 U.S. 375 (1980).

15. *HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1198 n.9 (3d Cir. 1996).

16. *Japan Petroleum Co. v. Ashland Oil, Inc.*, 456 F. Supp. 831, 836 (D. Del. 1978).

17. *Tankersley v. Albright*, 514 F.2d 956, 965 (7th Cir. 1975) (quoting John W. Reed,

that (1) all parties interested in the outcome of the suit have a chance to affect the outcome and (2) the judgment rendered is a “complete, consistent, and efficient settlement of the controvers[y].”<sup>18</sup>

In 1966, Congress amended Rule 19 to require courts to rely on pragmatic rather than formulaic considerations when resolving joinder problems.<sup>19</sup> To ensure that courts rely on such considerations, the Advisory Committee suggested “four factors in subdivision (b)” to aid in determining whether to proceed in a party’s absence or to dismiss the suit entirely.<sup>20</sup> Notably, the committee did not intend to exclude additional context-based factors from consideration.<sup>21</sup> Indeed, the committee found that, when determining whether to dismiss a case for nonjoinder, a court must base its decision “on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.”<sup>22</sup> The 1966 amendment thus requires courts to rely on practical considerations when initially deciding whether an absent party “is a person to be joined if feasible” under Rule 19(a) and whether to dismiss an action for failure to join an indispensable party under Rule 19(b).<sup>23</sup> The following section discusses what modern courts consider when applying Rule 19.

### *B. Application of Rule 19*

Under Rule 19, courts apply a three-step process to determine whether to dismiss an action for failure to join a purportedly indispensable party. First, courts determine whether the absent party’s presence is “necessary.”<sup>24</sup> If not,

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*Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957)).

18. *Id.* at 968.

19. Jean F. Rydstrom, *Who Must Be Joined in Action as Persons ‘Needed for Just Adjudication’ Under Rule 19(A), Federal Rules of Civil Procedure*, 22 A.L.R. FED. 765, § 4, at 775 (1975) [hereinafter Rydstrom, *Who Must Be Joined*].

20. Jean F. Rydstrom, *Validity, Construction, and Application of Rule 19(B) of Federal Rules of Civil Procedure, as Amended in 1966, Providing for Determination to be Made by Court to Proceed With or Dismiss Action when Joinder of Person Needed for Just Adjudication is Not Feasible*, 21 A.L.R. FED. 12, § 3, at 23 (1974) [hereinafter Rydstrom, *Validity*].

21. *Id.*

22. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968).

23. Rydstrom, *Who Must Be Joined*, *supra* note 19, § 4, at 776.

24. FED. R. CIV. P. 19(a); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001); *Viacom Int’l, Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000); *Laker Airways, Inc. v. British Airways*, 182 F.3d 843, 847 (11th Cir. 1999); *Shetter v. Amerada Hess Corp.*, 14 F.3d 934, 938 (3d Cir. 1994); *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1345 (6th Cir. 1993).

the motion to dismiss is denied.<sup>25</sup> Second, if the party's presence is necessary, courts determine whether joinder of the absent party is "feasible."<sup>26</sup> If so, the party is compelled to join.<sup>27</sup> "Finally, if joinder is not 'feasible,' [courts determine] whether the absent party is 'indispensable' . . . ."<sup>28</sup> If so, they must dismiss the suit.<sup>29</sup> The party moving for joinder or dismissal for failure to join bears the burden of demonstrating that joinder is necessary and feasible and that the absent party is indispensable.<sup>30</sup>

### 1. "Necessary" Parties

The courts' initial determination concerns whether the absent party is a necessary party as defined by Rule 19(a). A person is a necessary party if "(1) in the person's absence complete relief cannot be accorded among those already parties;"<sup>31</sup> "(2) the person claims an interest relating to the subject of the action and . . . disposition of the action in the person's absence may . . . impair or impede the person's ability to protect that interest;"<sup>32</sup> or (3) "the person claims an interest relating to the subject of the action and . . . disposition of the action in the person's absence may . . . leave . . . [the current parties] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest."<sup>33</sup> "There is no precise formula for determining whether a particular nonparty" is necessary to an action; "[t]he determination is heavily influenced by the facts and circumstances of each case."<sup>34</sup>

25. See FED. R. CIV. P. 19(b) (stating that action should be dismissed for failure to join an indispensable party only if, inter alia, absent party is a necessary party as described in subdivision (a)(1)-(2) of the rule).

26. FED. R. CIV. P. 19(a); *Dawavendewa*, 276 F.3d at 1159; *Citizen Potawatomi Nation*, 248 F.3d at 997; *Kearney*, 212 F.3d at 724; *Laker Airways*, 182 F.3d at 848; *Shetter*, 14 F.3d at 938; *Keweenaw Bay*, 11 F.3d at 1345.

27. FED. R. CIV. P. 19(a) ("If the person has not been so joined, the court shall order that the person be made a party.").

28. *United States v. Bowen*, 172 F.3d 682, 688 (9th Cir. 1999); see also FED. R. CIV. P. 19(b); *Dawavendewa*, 276 F.3d at 1155; *Citizen Potawatomi Nation*, 248 F.3d at 997; *Kearney*, 212 F.3d at 725; *Laker Airways*, 182 F.3d at 847; *Shetter*, 14 F.3d at 938; *Keweenaw Bay*, 11 F.3d at 1345.

29. FED. R. CIV. P. 19(b); *Patterson*, 390 U.S. at 118-19; *Kearney*, 212 F.3d at 725; *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999).

30. *Davis*, 192 F.3d at 958; *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1411 (10th Cir. 1996); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990); *Third Ave. Trust v. Suntrust Bank*, 163 F. Supp. 2d 215, 218 (S.D.N.Y. 2001).

31. FED. R. CIV. P. 19(a)(1).

32. FED. R. CIV. P. 19(a)(2)(i).

33. FED. R. CIV. P. 19(a)(2)(ii).

34. *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982).

In determining whether they can afford complete relief in the party's absence, courts base their decisions on the interests of the persons already parties to the lawsuit in isolation and not in relation to the absent party.<sup>35</sup> "The possibility that the successful party to the original litigation might have to defend against a subsequent suit by the receiver does not make the receiver a necessary party to the action."<sup>36</sup> Thus, courts focus on administering relief among the present parties "and not on the speculative possibilit[ies] of further litigation between a party and an absent person."<sup>37</sup>

Rule 19 requires only that the absent party assert a nonfrivolous,<sup>38</sup> legally protected interest in the suit to be deemed a necessary party.<sup>39</sup> The rule does not require that the absent party actually possess the legal interest, only that it claim a legal interest relating to the suit.<sup>40</sup> A majority of courts require more than a speculative interest about future events or more than a mere financial or convenience interest.<sup>41</sup> For example, joint and several liability between a named party and an absent person is insufficient to deem the absent party a necessary party.<sup>42</sup> However, if "federal litigation would have a preclusive

35. *Angst v. Royal Maccabees Life Ins. Co.*, 77 F.3d 701, 705 (3d Cir. 1996).

36. *Id.*

37. *LLC Corp. v. Pension Benefit Guar. Corp.*, 703 F.2d 301, 305 (8th Cir. 1983); *Morgan Guar. Trust Co. of N.Y. v. Martin*, 466 F.2d 593, 598 (7th Cir. 1972).

38. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001); *Davis v. United States*, 192 F.3d 951, 959 (10th Cir. 1999); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992).

39. *See United States v. San Juan Bay Marina*, 239 F.3d 400, 406 (1st Cir. 2001); *Shermoen*, 982 F.2d at 1317 ("Just adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest, even if the dispute is ultimately resolved to the detriment of that party."). *But see Iron Workers Local Union No. 17 Ins. Fund v. Phillip Morris Inc.*, 182 F.R.D. 512, 517-18 (N.D. Ohio 1998) (holding that the interest "need not be a 'legal interest,' but rather need only be a 'claim to an interest' that is 'sufficiently 'related to' the subject of the action'") (quoting *Local 670, United Rubber, Cork, Linoleum and Plastic Workers v. Int'l Union, United Rubber, Cork, Linoleum and Plastic Workers*, 822 F.2d 613, 620 (6th Cir. 1987)); *see also Local 670, United Rubber, Cork, Linoleum and Plastic Workers v. Int'l Union, United Rubber, Cork, Linoleum and Plastic Workers*, 822 F.2d 613, 620 (6th Cir. 1987).

40. *Davis*, 192 F.3d at 958.

41. *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 n.5 (9th Cir. 2002); *Coregis Ins. Co. v. Wheeler*, 180 F.R.D. 280, 283 (E.D. Pa. 1998); *United States v. Nye County*, 951 F. Supp. 1502, 1513 (D. Nev. 1996); *see also S. Co. Energy Mktg., L.P. v. Va. Elec. & Power Co.*, 190 F.R.D. 182, 185 (E.D. Va. 1999) ("A party is not necessary simply because joinder would be convenient, or because two claims share common facts, for that would render the distinction between permissive joinder under Rule 20 [of the Federal Rules of Civil Procedure], and joinder under Rule 19 'practically meaningless.'").

42. *See Adkins v. Labor Ready, Inc.*, 205 F.R.D. 460, 463 (S.D.W. Va. 2001); *see also Herpich v. Wallace*, 430 F.2d 792, 817 (5th Cir. 1970) ("Rule 19, as amended in 1966, was not meant to unsettle the well-established authority to the effect that joint tortfeasors or

effect [on an] absent party in subsequent state litigation," joinder is compulsory because preclusion impairs or impedes the absent party's ability to protect its interest in the subject matter of the litigation.<sup>43</sup> In sum, "necessary parties are those . . . against which a court's judgment will in fact operate."<sup>44</sup>

Despite having a legally protected interest, an absent party is not a necessary party if (1) the interests of the existing parties are such that they would undoubtedly make all of the nonparty's arguments; (2) the existing parties are willing and able to make such arguments"; and (3) the nonparty cannot provide any necessary element to the proceedings that the existing parties would omit.<sup>45</sup> "If the nonparties' interests are adequately represented by a party, the suit will not impede or impair the nonparties' interests, and therefore the nonparties will not be considered 'necessary.'"<sup>46</sup> However, if any significant conflict exists between the interest of a party and the interest of the nonparty, representation is not adequate, and a court must declare the nonparty necessary.<sup>47</sup>

## 2. Feasibility of Joinder

Once the court determines that an absent party's presence is necessary, it must determine whether joinder is feasible, which is a question of jurisdiction. Rule 19 does not extend or confer jurisdiction.<sup>48</sup> Thus, joinder is feasible only if absent parties are subject to service of process, and their joinder will not deprive the court of subject matter jurisdiction.<sup>49</sup> Courts most commonly determine that joinder is infeasible when jurisdiction is based on diversity of citizenship between the original parties.<sup>50</sup> However, sovereign immunity also renders joinder infeasible. When a sovereign such as an Indian tribe asserts

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coconspirators are not persons whose absence from a case will result in dismissal for non-joinder.").

43. *Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.*, 11 F.3d 399, 409 (3d Cir. 1993).

44. *W. Coast Exploration Co. v. McKay*, 213 F.2d 582, 592 (D.C. Cir. 1954).

45. *Shermoe v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992); *see Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998); *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996).

46. *Ramah*, 87 F.3d at 1351.

47. *See Cherokee Nation v. Babbitt*, 117 F.3d 1489, 1497 (D.C. Cir. 1997) (stating that, although the interests of the absent tribe and the United States are currently the same, the United States has previously reversed its position and could do so again, that the United States does not have to appeal any unfavorable decision, and that, as a nonparty, the absent tribe has no right to appeal).

48. *Rydstrom, Who Must Be Joined*, *supra* note 19, § 5(b), at 782-83.

49. *Id.* § 9, at 797.

50. *Id.* § 5(b), at 782.



its immunity, all suits against the sovereign are barred absent an unequivocal waiver by the sovereign or an abrogation by Congress.<sup>51</sup> Thus, when the absent party is immune, joinder is infeasible, and the courts must determine whether the absent party is indispensable.

### 3. Indispensability

If a court determines that joinder is infeasible, it must then analyze whether the absent party is indispensable. An absent party is indispensable if, "in equity and good conscience," the court cannot allow the action to proceed in its absence.<sup>52</sup> No prescribed formula exists to determine whether a person is an indispensable party because courts can only determine such a matter in the context of the particular litigation.<sup>53</sup> However, Rule 19 provides four factors for courts to consider in making this determination: (1) the prejudice to the existing parties or the absent party; (2) whether the court can shape relief to lessen the prejudice; (3) whether the court can award an adequate remedy among the existing parties without the absent party; and (4) whether an alternative forum exists in which the plaintiff can obtain an adequate remedy if the court dismisses the action for nonjoinder.<sup>54</sup> The Advisory Committee intended the first factor, extent of prejudice, to force courts to consider the

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51. See *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002) (holding that tribal sovereign immunity rendered joinder unfeasible); *Davis v. United States*, 192 F.3d 951, 959 n.8 (10th Cir. 1999); *Native Am. Mohegans v. United States*, 184 F. Supp. 2d 198, 210, 217 (D. Conn. 2002) (holding that sovereign immunity rendered joinder of both State and Indian Tribe infeasible).

52. FED. R. CIV. P. 19(b); *Dawavendewa*, 276 F.3d at 1155; *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 997 (10th Cir. 2001); *N. Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 648 (7th Cir. 1998).

53. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 118 (1968).

54. FED. R. CIV. P. 19(b); *Dawavendewa*, 276 F.3d at 1161-62; *Citizen Potawatomi Nation*, 248 F.3d at 997. The four factors listed in Rule 19(b) are not the only factors that courts may consider in determining indispensability. Courts also consider whether a valid, binding judgment was entered at the trial level; the stage of lawsuit at which the joinder issue was raised; the consideration of efficiency (i.e., time and expense of previous trial); whether the plaintiff dropped the defendants from the suit under Rule 21 to secure diversity of citizenship; the location of an alternative forum and resulting inconvenience to plaintiff; and the ability of the existing parties to fully represent the absent party's interests. See Rydstrom, *Validity*, *supra* note 20, § 13, at 65-72. Additionally, some courts hold that any absent party to a contract is per se indispensable to the litigation affecting the contract. See, e.g., *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975); see also *Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 547 (2d Cir. 1991); *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1987); *Niagra Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 862 F. Supp. 995, 1004 (W.D.N.Y. 1994). In sum, the rule requires that courts take into account any and all pragmatic considerations when determining whether to dismiss the lawsuit.

judgment's effect on the absent party.<sup>55</sup> Courts must determine whether, as a practical matter, the judgment affects the absent party and, if so, whether the effect will be "immediate and serious, or remote and minor."<sup>56</sup> The second factor, the extent to which the court can avoid prejudice, requires the court to consider all available relief measures to avert or lessen the prejudice and to accommodate the interests of the existing parties, the absent party, and the courts' and the public's interest "in efficient judicial administration."<sup>57</sup> The third factor — adequacy of the judgment — directs the court's attention to the extent that it can actually provide effective relief among the existing parties and still avoid repeated or multiple lawsuits.<sup>58</sup> The fourth factor — adequacy of plaintiff's remedy upon dismissal — requires the court to determine whether an alternative forum exists in which the plaintiff can sue and obtain effective relief.<sup>59</sup> Generally, the absence of an alternative forum outweighs the resulting prejudice from the court proceeding in the party's absence.<sup>60</sup>

When applying Rule 19 to cases involving Indian tribes, courts generally dismiss suits because the tribes' sovereign immunity renders joinder infeasible. The following discussion describes the doctrine of sovereign immunity and its application to Indian tribes.

### III. Tribal Sovereign Immunity

#### A. The Doctrine of Sovereign Immunity

Sovereign immunity, also known as "freedom from suit," is a common-law concept rooted in "the English concept of the divine right of royalty."<sup>61</sup> Under such a conception, "the monarch could do no wrong and therefore no suit against the monarchy could be legitimate."<sup>62</sup> In the United States, however, sovereign immunity stems from the idea that subjecting the government to suits would prevent it from "performing its essential functions."<sup>63</sup>

The doctrine of sovereign immunity protects both national and state governments.<sup>64</sup> As sovereigns, both governments retain the power "to define

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55. Rydstrom, *Validity*, *supra* note 20, § 9, at 39.

56. *Id.*

57. *Id.* § 10(a), at 50; *see also Patterson*, 390 U.S. at 111.

58. Rydstrom, *Validity*, *supra* note 20, § 11(a), at 55.

59. *Id.* § 12(a), at 58-59.

60. *Id.*

61. Theresa R. Wilson, *Nations Within a Nation: The Evolution of Tribal Immunity*, 24 AM. INDIAN L. REV. 99, 101 (1999-2000).

62. *Id.*

63. *Id.*

64. Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity*

when and under what circumstances" they will subject themselves to suit.<sup>65</sup> The federal government is sovereign, and "immunity is an inherent attribute of [that] sovereignty."<sup>66</sup> Although the U.S. Supreme Court has noted the doctrine's lack of authoritative roots,<sup>67</sup> it is "'embodied in the Constitution."<sup>68</sup> As to the states, the Eleventh Amendment "prohibits suits against the states" in federal court, and the Supreme Court has held that states' sovereign immunity also applies in state court.<sup>69</sup> Regardless of the doctrine's origins, "[t]he Court has held that the Constitution prohibits suits against states in federal [or state] court by a state's own citizens, by citizens of another state, . . . by citizens of other countries, . . . by foreign nations and by [Indian] tribes."<sup>70</sup>

The doctrine of sovereign immunity also applies to Indian tribes. Like the national and state governments, Indian tribes are sovereign entities and therefore possess similar powers of sovereign immunity.

## *B. Development of Tribal Sovereign Immunity*

### *1. Sovereign Immunity as an Element of Tribal Sovereignty*

Society has long regarded Indian tribes as separate sovereigns. Indeed, "[a]t the time of European discovery of America, the tribes were sovereign by nature and necessity; they conducted their own affairs and depended on no outside source of power to legitimize their acts of government."<sup>71</sup> Thus, for all practical purposes, the European settlers and the British Crown treated the Indians as sovereigns possessing full ownership rights to the American lands.<sup>72</sup>

"Early in [our] nation's history, the . . . United States . . . recognized [Indians] as separate sovereigns whose existence necessitated nation-to-nation diplomacy and treaty-making."<sup>73</sup> In *Santa Clara Pueblo v. Martinez*,<sup>74</sup> Justice Marshall best described the tribes' sovereignty:

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*of American Indian Sovereignty*, 37 TULSA L. REV. 661, 669 (2002).

65. *Id.*

66. *Id.* at 670.

67. *Id.* at 670 n.30 (citing *United States v. Lee*, 106 U.S. 196, 207 (1882)).

68. *Id.* at 670 n.29 (quoting *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting)).

69. *Wilson*, *supra* note 61, at 102 (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989); *Hans v. Louisiana*, 134 U.S. 1 (1890)).

70. *Seielstad*, *supra* note 64, at 674 (citations omitted).

71. *Id.* at 683 (quoting WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 68 (3d ed. 1998)).

72. *Id.* at 684.

73. *Id.*

74. 436 U.S. 49 (1978).

Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. Although no longer 'possessed of the full attributes of sovereignty,' they remain a 'separate people, with the power of regulating their internal and social relations.' They have the power to make their own substantive law in internal matters, and to enforce that law in their own forums.<sup>75</sup>

Thus, as self-governing peoples whose presence in American pre-existed the drafting of the Constitution, Indian tribes enjoy the inherent sovereignty provided by their pre-constitutional establishment of self-government.

The legal foundation for the tribes' sovereign status is traced to a trio of Supreme Court cases known as the "Marshall Trilogy,"<sup>76</sup> in which the Court acknowledged the existence of tribal sovereignty<sup>77</sup> and concluded that tribes are "domestic dependent nations"<sup>78</sup> retaining their separate sovereign status subject to U.S. governmental regulation.<sup>79</sup> The Marshall Trilogy provided a framework for acknowledging and defining basic tribal sovereignty as a matter of federal law, and the cases that followed built upon that framework, providing the foundation for the doctrine of tribal sovereign immunity.<sup>80</sup>

## 2. Modern Doctrine of Tribal Sovereign Immunity

The doctrine of tribal sovereign immunity remains firmly entrenched in the federal common law. "In each of its decisions regarding tribal immunity, the

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75. *Id.* at 55-56 (citations omitted).

76. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

77. Seielstad, *supra* note 64, at 687.

78. *Cherokee Nation*, 30 U.S. (5 Pet.) at 17.

79. *Worcester*, 31 U.S. (6 Pet.) at 561.

80. See Seielstad, *supra* note 64, at 688-89.

[A]fter these three early cases several foundational principles are acknowledged by the Supreme Court: (1) based upon their indigenous claims to land and political status, tribes enjoy certain sovereignty that preexisted the formation of the United States of America, and (2) this sovereignty is subject to abrogation or diminution only by the federal government, not the states. Furthermore, from the latter principle, together with the Court's determination that the tribes were dependent upon the United States for protection, the principle that the United States owed to tribes a trust responsibility also emerged as a matter of Supreme Court precedent. While the sovereignty enjoyed by tribes under early federal common law was not absolute, the fact that a form of inherent sovereignty was recognized is significant to the development of other principles of tribal sovereignty such as the doctrine of tribal immunity.

*Id.*

[Supreme] Court has consistently upheld the principle that ‘an Indian tribe is subject to suit only where Congress has authorized suit or the tribe has waived its immunity.’”<sup>81</sup> Today, the doctrine protects tribes from suit in federal, state, and tribal courts. Moreover, tribes are immune whether sued directly or via cross-claim or counterclaim, whether the activity takes place on or off the reservation, whether the activity is commercial or noncommercial, and whether the activity is governmental or nongovernmental.<sup>82</sup> Indeed, “[w]ith the exception of suits brought by the federal government, tribes maintain immunity from suit vis-à-vis all other entities.”<sup>83</sup> Tribes cannot assert their sovereign immunity against the United States because, as “domestic dependant nations,”<sup>84</sup> the tribes’ sovereign powers are inferior to those of the U.S. government.<sup>85</sup> Nonetheless, unless Congress exercises its authority to limit or reform the doctrine of tribal sovereign immunity,<sup>86</sup> tribes remain largely immune from suit.

In sum, “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”<sup>87</sup> Unless tribes waive their immunity or Congress abrogates it, they cannot be haled into court. Thus, courts cannot join tribes to a lawsuit, even if they are deemed “necessary” under Rule 19(a). Indeed, sovereign immunity renders joinder infeasible, causing numerous courts to apply Rule 19 to bar suits involving various interests of Indian tribes. The result is that plaintiffs are left without any available forum in which to seek relief.

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81. *Id.* at 699 (quoting *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 752 (1998)).

82. *Id.*

83. *Id.*

84. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

85. *See United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 382 (8th Cir. 1987) (“[I]t is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States.”); *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 920 (9th Cir. 1986) (“The Tribe’s own sovereignty does not extend to preventing the federal government from exercising its superior sovereign powers.”); *see also Fla. Paraplegic Ass’n, Inc. v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1135 (11th Cir. 1999) (holding that tribal sovereign immunity does not bar suits by the United States); *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996) (same).

86. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978) (“Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess.”). While Congress’ power over the tribes is plenary, it exercises its power in regulating tribal sovereign immunity conservatively and has abrogated or limited tribal sovereign immunity in few specific contexts. *See Seielstad, supra* note 64, at 717-51 (discussing congressional legislation regarding tribal affairs and its effect on tribal sovereign immunity).

87. *Santa Clara Pueblo*, 436 U.S. at 58.

#### IV. Cases Applying Rule 19 to Absent Tribes

Courts have applied Rule 19 in numerous cases involving absent Indian tribes.<sup>88</sup> In virtually every case, once courts deem the absent tribe a necessary

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88. See, e.g., *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015 (9th Cir. 2002) (racetrack owners brought suit to enjoin Arizona governor from entering new, renewed, or modified gaming compacts with absent Indian tribes); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150 (9th Cir. 2002) (employee brought Title VII action against employer challenging employment preferences that employer is required to give to qualified members of absent Indian tribe pursuant to employer's lease with tribe); *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001) (state brought suit against National Indian Gaming Commission (NIGC) and others challenging the NIGC's decision declaring land leased by absent tribe "Indian Lands" for purposes of the Indian Gaming Regulatory Act); *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001) (Indian tribes and Kansas sued to prevent Secretary of the Interior from taking a tract of land into trust on behalf of absent Indian tribe and approving gaming activities on tract); *Davis v. United States*, 192 F.3d 951 (10th Cir. 1999) (certain bands of absent tribe brought action against the Secretary of the Interior challenging Secretary's exclusion of bands from Judgment Fund Programs and refusal to issue Certificates of Degree of Indian Blood to members of the bands); *Clinton v. Babbitt*, 180 F.3d 1081 (9th Cir. 1999) (Navajo tribe members brought suit against Secretary of the Interior to challenge Secretary's approval of leases with absent tribe); *Washington v. Daley*, 173 F.3d 1158 (9th Cir. 1999) (State sued Secretary of Commerce challenging fishing regulations that allocated fish to absent tribes); *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152 (9th Cir. 1998) (environmental organization brought suit against Secretary of the Interior alleging that approved use of water storage facility, in which absent tribe stored water, violated the National Environmental Policy Act); *Cherokee Nation v. Babbitt*, 117 F.3d 1489 (D.C. Cir. 1997) (Cherokee Nation sued Secretary of the Interior challenging Secretary's decision to recognize absent tribe as a federally recognized tribe); *Kescoli v. Babbitt*, 101 F.3d 1304 (9th Cir. 1996) (individual member of absent tribe brought suit challenging Secretary of the Interior's approval of settlement agreement between absent tribe and coal mining company); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476 (7th Cir. 1996) (*Qui tam* action to invalidate sales and lease contracts for gambling equipment and supplies to absent tribe); *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996) (tribal school board brought suit against Secretary of the Interior challenging Secretary's allocation of funds among tribe and other absent tribes); *Pit River Home & Agric. Coop. v. United States*, 30 F.3d 1088 (9th Cir. 1994) (group of Indian families sued Secretary of the Interior challenging Secretary's decision granting beneficial ownership of real property to absent tribe); *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341 (6th Cir. 1993) (one band of tribe sued State disputing fishing rights granted to band and absent bands of same tribe); *State of South Dakota v. Bourland*, 949 F.2d 984 (8th Cir. 1991) (state brought suit against officials of absent tribe seeking to enjoin them from regulating hunting and fishing activities of non-Indians); *Makah Indian Tribe v. Verity*, 910 F.2d 555 (9th Cir. 1990) (tribe brought suit challenging federal regulations allocating fishing rights among tribe and other absent tribes); *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989) (lessees sued United States and Indian tribe for breach of lease agreement); *Manygoats v. Kleppe*, 558 F.2d 556 (10th Cir. 1977) (members of absent tribe sued to enjoin performance under lease agreement between tribe and corporation); *Lomayaktewa v. Hathaway*, 520 F.2d

party under Rule 19(a), it dismisses the suit on the basis that joinder is infeasible and the absent tribe is "indispensable" to the action.<sup>89</sup>

### A. Absent Tribes as Necessary Parties

Many courts have held that absent tribes are necessary parties to a lawsuit under Rule 19(a).<sup>90</sup> In so holding, courts have found that (1) complete relief cannot be accorded to the present parties in the tribes' absence;<sup>91</sup> (2) the absent tribes can claim a nonfrivolous interest in the suit and, as such, disposition in their absence would impair or impede the tribes' ability to protect this interest;<sup>92</sup> and/or (3) disposition in the tribes' absence will subject

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1324 (9th Cir. 1975) (tribal faction leaders brought suit to invalidate lease of tribal land to coal-mining company); *Tewa Tesuque v. Morton*, 498 F.2d 240 (10th Cir. 1974) (class action by members of absent tribe against Secretary of the Interior challenging Secretary's approval of lease between the tribe and a developer).

89. For an exception, see *Manygoats*, 558 F.2d at 558-59. In *Manygoats*, the court held that an absent tribe was a necessary party and joinder was infeasible due to the tribe's sovereign immunity. However, the court concluded that the tribe was not indispensable because, even if plaintiffs prevail, the result would only require additional action by the Secretary of the Interior. Judgment in favor of the plaintiffs would not call for any action by or against the tribe.

90. See, e.g., *Am. Greyhound Racing*, 305 F.3d at 1023; *Dawavendewa*, 276 F.3d at 1159; *Davis*, 192 F.3d at 959; *Clinton*, 180 F.3d at 1089; *Kescoli*, 101 F.3d at 1309; *Tribal Dev. Corp.*, 100 F.3d at 478-79; *Pit River*, 30 F.3d at 1099; *Makah Indian Tribe*, 910 F.2d 559; *Lomayaktewa*, 520 F.2d at 1325.

91. See, e.g., *Dawavendewa*, 276 F.3d at 1155-56 (finding that absent tribes would not be bound by the judgment and could seek to enforce the lease provision in tribal court, rendering the plaintiff without complete relief even if victorious); *Clinton*, 180 F.3d at 1088 (finding that it could not provide relief to current parties because absent tribe was a party to the lease in question); *Pit River*, 30 F.3d at 1099 (finding that complete relief could not be accorded because the judgment would not bind the absent tribe, which could later assert its rights to the property).

92. See, e.g., *Am. Greyhound Racing*, 305 F.3d at 1023-24 (finding that disposition would impair (1) tribe's claimed interest in existing gaming compact because current litigation would foreclose tribe's right to renew compacts and (2) tribes' sovereign power to negotiate compacts); *Dawavendewa*, 276 F.3d at 1157 (finding that (1) "the instant litigation threatens to impair the [tribe's] contractual interests, and thus, its fundamental economic relationship with [the other party to the contract]" and (2) the judgment would impair absent tribe's capacity to negotiate contracts and govern the reservation effectively and efficiently); *Davis*, 192 F.3d at 959 (finding that "[t]he Tribe's claimed interest in determining eligibility requirements and adopting ordinances embodying those requirements is neither fabricated nor frivolous. The disposition of Plaintiffs' . . . claim in the Tribe's absence will impair or impede the Tribe's ability to protect its claimed interest."); *Clinton*, 180 F.3d at 1089 (finding that the requested declaration would prohibit absent tribe from fulfilling its obligation to enter into lease, deprive the tribe of substantial compensation, and impair tribe's interest in regaining jurisdiction over tribal land); *Kescoli*, 101 F.3d at 1310 (finding that plaintiff's action could affect the absent tribes' interests in lease agreements and their ability to obtain bargained-for royalties and jobs); *Tribal Dev. Corp.*, 100 F.3d at 479 ("As a party to the lease contracts at issue here, the Tribe has a commercial stake in the outcome of this litigation."); *Pit River*, 30 F.3d at 1099 (finding that

the present parties to a substantial risk of incurring multiple or inconsistent obligations because of the claimed interest.<sup>93</sup> Some courts have held, however, that the absent tribe is not a necessary party in cases involving the United States as the defendant, finding that the United States could adequately represent the tribe's interest because of its trust obligation to the tribes.<sup>94</sup> In *Washington v. Daley*,<sup>95</sup> for example, the State of Washington sued the Secretary of Commerce to invalidate regulations that allocated fishing rights to four absent Indian tribes.<sup>96</sup> Despite finding that the absent tribes possessed an interest in the subject of the suit because, if the plaintiffs prevailed, the tribes would lose their fishing rights,<sup>97</sup> the court concluded that the tribes were not necessary parties.<sup>98</sup> The court reasoned that the United States could adequately represent tribal interests<sup>99</sup> because the government and the absent tribes did not disagree on the issues, and the government's trust obligation to the tribes obligated it to protect their interests.<sup>100</sup> Consequently, the court

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plaintiff's action seeking ownership of real property would impair absent tribe's interest in retaining ownership of the property and preserving its sovereign immunity). *But see Ramah*, 87 F.3d at 1351 (holding that tribes do not have a legally protected interest in the suit because, due to "the large hassle and negligible benefits, . . . the released funds 'most definitely would not be used to increase existing contracts to a higher funding level'" (quoting Aff. of Daisy West, Indian Self-Determination Analyst for the BIA at 2, *Ramah* (No. 95-5348))).

93. *See, e.g., Dawavendewa*, 276 F.3d at 1158 (finding that the judgment would not bind the absent tribe, which could continue to enforce the lease, subjecting current defendant to "intractable, mutually exclusive alternatives" and a "substantial risk of facing multiple, inconsistent obligations"); *Pit River*, 30 F.3d at 1099 ("A judgment for the [plaintiff] finding a fiduciary duty owed to the [plaintiff] by the government would subject the government to additional multiple or inconsistent obligations.").

94. *See, e.g., Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) (finding that interests of the federal agency defendants, tribal officials, and other contracting party, "considered together, are substantially similar, if not identical, to the Tribe's interests in upholding the NIGC's decision"); *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001) ("As a practical matter, the Secretary's interest in defending his determinations is 'virtually identical' to the interests of the [absent tribe]."); *Washington v. Daley*, 173 F.3d 1158, 1167-68 (9th Cir. 1999) ("There is no conflict of interest between the federal defendants and the Tribes in the instant matter. In fact, the Secretary and the Tribes have virtually identical interests in this regard.") (citation omitted); *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d 1152, 1154 (9th Cir. 1998) (finding that the Secretary of the Interior and absent tribe "share a strong interest in defeating" the plaintiff's suit and, therefore, that the Secretary can adequately represent the tribe's interest); *Ramah*, 87 F.3d at 1351 (finding no conflict between interests of the absent tribe and Secretary of the Interior).

95. 173 F.3d 1158 (9th Cir. 1999).

96. *Id.* at 1161.

97. *Id.* at 1167.

98. *Id.* at 1169.

99. *Id.*

100. *Id.* at 1168.



found that “[t]he Tribes are not necessary parties because there is no direct conflict between the federal defendants and the Tribes, or between the Tribes themselves.”<sup>101</sup> Thus, in cases where the government’s interests are, as a practical matter, the same as the absent tribes’ interests, the tribes are not necessary parties.<sup>102</sup> Conversely, if the interests of the absent tribes conflict with the interests of the United States, the tribe is a necessary party.<sup>103</sup> Furthermore, in cases involving multiple tribes, courts have concluded that the federal government cannot adequately represent the absent tribes because the absent tribes’ interests could potentially conflict with each other.<sup>104</sup>

### *B. Feasibility of Joining Absent Tribes*

Courts labeling absent tribes as necessary parties have recognized that tribal sovereign immunity prevents them from joining the tribes as parties to the lawsuit.<sup>105</sup> In fact, parties rarely contest feasibility of joinder because litigants acknowledge that tribal sovereign immunity protects tribes from suit unless

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101. *Id.* at 1169.

102. *Id.* at 1167.

103. *See, e.g.,* Cherokee Nation v. Babbitt, 117 F.3d 1489, 1497 (D.C. Cir. 1997) (finding that the federal government’s interests might diverge from those of the absent tribes because, although they currently share the same interests, the United States has reversed its position twice and may reverse itself again); United States *ex rel.* Hall v. Tribal Dev. Corp., 100 F.3d 476, 479 (7th Cir. 1996) (finding that the presence of the United States did not alleviate the concerns of Rule 19(a) “given the Tribe’s unwillingness to join the present action”); Manygoats v. Kleppe, 558 F.2d 556, 558 (10th Cir. 1977) (finding that the United States could not represent the tribe’s interests because national interest in enforcing National Environment Policy Act may conflict with absent tribe’s interests in benefits received from agreement with Exxon); *see also* Am. Greyhound Racing, Inc. v. Hull, 305 F.3d 1015, 1023 n.5 (9th Cir. 2002) (noting that the state governor could not adequately represent absent tribe’s interests because “the State and the tribes have often been adversaries in disputes over gaming, and the State owes no trust duty to the tribes”).

104. *See, e.g.,* Pit River Home & Agric. Coop. v. United States, 30 F.3d 1088, 1101 (9th Cir. 1994) (holding that the United States could not represent absent tribe because case involved intertribal conflicts that could subject the United States to inconsistent duties or obligations); Shermoen v. United States, 982 F.2d 1312, 1318 (9th Cir. 1992) (holding that the United States could not adequately represent the interests of nonparty tribes where “competing interests and divergent concerns of the tribes” might conflict with the United States’ role as trustee); Makah Indian Tribe v. Verity, 910 F.2d 555, 560 (9th Cir. 1990) (holding that the United States could not represent the interests of all absent tribes because of “potential intertribal conflicts”); *see also* Citizen Potawatomi Nation v. Norton, 248 F.3d 993, 999 (10th Cir. 2001); Cherokee Nation, 117 F.3d at 1497; Manygoats, 558 F.2d at 558.

105. *See, e.g.,* Am. Greyhound Racing, 305 F.3d at 1022; Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1159 (9th Cir. 2002); Kescoli v. Babbitt, 101 F.3d 1304, 1310 (9th Cir. 1996); Keweenaw Bay Indian Cmty. v. Michigan, 11 F.3d 1341, 1347 (6th Cir. 1993); Manygoats, 558 F.2d at 557-58; Lomayaktewa v. Hathaway, 520 F.2d 1324, 1326 (9th Cir. 1975).

the tribes consent or Congress abrogates their immunity.<sup>106</sup> Thus, joinder is not feasible, and courts have been forced to analyze whether the tribes are indispensable parties.

### *C. Indispensability of Absent, Necessary Tribes*

In virtually all cases in which courts have declared an absent tribe a necessary party, the courts have also declared the tribe indispensable.<sup>107</sup> In applying the factors provided in Rule 19(b) to the absent tribes, courts generally have found that the first three factors support dismissal and that the fourth factor — the plaintiff's lack of an adequate alternative remedy — weighs against dismissal because the tribe's sovereign immunity bars the suit in any forum.

When applying the first factor, courts have invariably found that the absent tribe will suffer prejudice if the case proceeds.<sup>108</sup> While judgment in the tribe's absence does not bind the tribe,<sup>109</sup> as a practical matter it does have an effect on the tribe stemming from the same interest that makes the absent tribe

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106. See, e.g., *Davis v. United States*, 192 F.3d 951, 959 n.8 (10th Cir. 1999) ("Plaintiffs do not argue the Tribe's sovereign immunity has been waived by the Tribe or abrogated by Congress. Consequently, that issue is not before this court.") (citations omitted).

107. See, e.g., *Am. Greyhound Racing*, 305 F.3d at 1025; *Dawavendewa*, 276 F.3d at 1163; *Clinton v. Babbitt*, 180 F.3d 1081, 1089-90 (9th Cir. 1999); *Kescoli*, 101 F.3d at 1311; *Pit River*, 30 F.3d at 1103; *Lomayaktewa*, 520 F.2d at 1325 ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or contract, all parties who may be affected by the determination of the action are indispensable."); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242-43 (10th Cir. 1974).

108. See, e.g., *Am. Greyhound Racing*, 305 F.3d at 1025 (finding that tribes would be prejudiced by required termination of the gaming compacts); *Dawavendewa*, 276 F.3d at 1162 (finding that a decision would prejudice (1) the absent tribe's economic interests in the lease and sovereign interests in negotiating contractual obligations and governing the reservation; and (2) the defendant, by leaving defendant facing an irreconcilable conflict between its obligations to the plaintiff and the absent tribe); *Clinton*, 180 F.3d at 1090; *Kescoli*, 101 F.3d at 1311 (finding that prejudice would result to tribe by virtue of its interest as a party to the lease and settlement agreements); *Tribal Dev. Corp.*, 100 F.3d at 479 (finding that prejudice would result to tribe because tribe is a party to the lease contracts that plaintiff seeks to void); *Pit River*, 30 F.3d at 1101 (finding that a judgment granting the plaintiffs rights to the property or finding that the government owes plaintiffs a duty would prejudice the tribe's right to self-government); *Lomayaktewa*, 520 F.2d at 1326 (finding that tribe's interest in receiving royalties and gaining employment for members under the lease is prejudiced if case proceeds in tribe's absence); *Tewa Tesuque*, 498 F.2d at 242 (finding that absent tribe would lose rental income and employment opportunities for members if lease were cancelled).

109. See, e.g., *Am. Greyhound Racing*, 305 F.3d at 1024 (recognizing that absent tribes "are not bound by [the court's] ruling under principles of res judicata or collateral estoppel because they are not parties" and could therefore relitigate the issues free of such constraints).

a “necessary” party under Rule 19(a).<sup>110</sup> For example, in *Dawavendewa v. Salt River Project Agricultural Improvement & Power District*,<sup>111</sup> the court held that an absent tribe was a necessary party under Rule 19(a) because the tribe had a legally protected interest in a contract with the defendant.<sup>112</sup> Because of this contractual interest, the court concluded that the tribe would suffer prejudice if the court rendered a decision in the tribe’s absence.<sup>113</sup> The court explained that “[t]he prejudice to the [tribe] stems from the same impairment of legal interests that makes the [tribe] a necessary party under Rule 19(a)(2)(i).”<sup>114</sup> However, although courts rarely consider the government’s presence as a party in their indispensability analysis,<sup>115</sup> the presence of the United States may function to offset the potential prejudice.<sup>116</sup> Thus, because the government’s presence frequently offsets or at least substantially decreases the potential for prejudice to the absent tribe, the balance of the indispensability factors could shift against dismissal.<sup>117</sup> Unfortunately, most courts have ignored the government’s presence when conducting the Rule 19(b) analysis. Upon finding that the absent tribe will suffer prejudice, most courts have simply concluded that the prejudice is unavoidable.<sup>118</sup> In cases where the potential for prejudice is minimal, courts have found it unnecessary to consider the second factor.<sup>119</sup> Furthermore, in applying the third factor,

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110. See, e.g., *id.* at 1024-25 (“[T]he first factor of prejudice, insofar as it focuses on the absent party, largely duplicates the consideration that made a party necessary under Rule 19(a) . . . .”); *Clinton*, 180 F.3d at 1090 (“[P]rejudice stems from the same legal interests making someone a necessary party to the action.”); *Tribal Dev. Corp.*, 100 F.3d at 479 (same).

111. 276 F.3d 1150 (9th Cir. 2002).

112. *Id.* at 1156.

113. *Id.* at 1162.

114. *Id.*

115. See *infra* Part VI.A proposing that courts give more weight to the federal government’s ability to represent the absent tribes’ interests when conducting an indispensability analysis.

116. See *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (holding that, even if the tribe were a necessary party, the potential for prejudice would be offset in large part by the presence of Secretary of the Interior’s interests in defending his actions).

117. See *id.* (holding that the potential for prejudice was offset by the government’s ability to represent the absent tribe’s interests and, thus, the first and second factors favored nondismissal because the reduced potential for prejudice eliminated the need to explore “the availability of means for lessening or avoiding prejudice”) (quoting *Rishell v. Jane Phillips Episcopal Mem’l Med. Ctr.*, 94 F.3d 1407, 1412 (10th Cir. 1996)).

118. See, e.g., *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1025 (9th Cir. 2002); *Dawavendewa*, 276 F.3d at 1162; *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999); *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 480 (7th Cir. 1996); *Pit River Home & Agric. Coop. v. United States*, 30 F.3d 1088, 1101-02 (9th Cir. 1994); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1326 (9th Cir. 1975); *Tewa Tesuque v. Morton*, 498 F.2d 240, 242 (10th Cir. 1974).

119. See *Sac & Fox Nation*, 240 F.3d at 1260 (“Because the potential for prejudice is

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courts have found that any type of relief is inadequate if prejudice to the tribe results.<sup>120</sup> Moreover, although a few courts have found that the plaintiff will have an adequate alternative remedy if the case is dismissed,<sup>121</sup> the majority of courts have concluded to the contrary because tribal sovereign immunity bars the suit in any forum.<sup>122</sup> Unfortunately, these courts have concluded that the tribes' interest in asserting their sovereign immunity outweighs the plaintiffs' interests in litigating their claims.<sup>123</sup> Thus, although the absence of an alternative forum outweighs the prejudice that could potentially result to the absent tribes<sup>124</sup> and weighs heavily against dismissal,<sup>125</sup> courts have

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minimal, 'we need not be concerned with the second factor, which addresses the availability of means for lessening or avoiding prejudice.'" (quoting *Rishell*, 94 F.3d at 1412).

120. See, e.g., *Am. Greyhound Racing*, 305 F.3d at 1025 (finding that requested remedy impairs tribe's interests, and any other relief is inadequate); *Dawavendewa*, 276 F.3d at 1162; *Pit River*, 30 F.3d at 1102; *Lomayaktewa*, 520 F.2d at 1326 (finding that remedies other than invalidating the lease would be inadequate). But see *Tribal Dev. Corp.*, 100 F.3d at 480 (finding that third factor weighs against dismissal because "there is nothing to prevent a court from ordering [the requested] relief"); *Tewa Tesuque*, 498 F.2d at 242-43 (finding that judgment "would not be adequate . . . because it may very likely invite additional lawsuits").

121. See, e.g., *Dawavendewa*, 276 F.3d at 1162-63 (stating that plaintiff may have an adequate alternative remedy by refile suit in conjunction with the EEOC because tribe's sovereign immunity does not apply against the United States, and the EEOC had tried to intervene and salvage plaintiff's case at the last minute); *Pit River*, 30 F.3d at 1102 n.9 (noting that the plaintiff "possibly could pursue a claim for monetary relief under the Tucker Act, 28 U.S.C. § 1346"); *Tewa Tesuque*, 498 F.2d at 243 (holding that the dispute is an internal dispute and should be resolved by the tribal council and not the courts).

122. See, e.g., *Am. Greyhound Racing*, 305 F.3d at 1025; *Clinton*, 180 F.3d at 1090; *Tribal Dev. Corp.*, 100 F.3d at 480; *Lomayaktewa*, 520 F.2d at 1326.

123. See *Confederated Tribes v. Lujan*, 928 F.2d 1496, 1500 (9th Cir. 1991); see also *Am. Greyhound Racing*, 305 F.3d at 1025 ("[T]ribes' interest in maintaining their sovereign immunity outweighs the plaintiffs' interest in litigating their claims."); *Clinton*, 180 F.3d at 1090 ("[T]he [tribe's] interest in maintaining its sovereign immunity outweighs the interest of the plaintiffs in litigating their claim."); *Kescoli*, 101 F.3d at 1311 ("[A]lthough the factors were not clearly in favor of dismissal, the concern for the protection of tribal sovereignty warranted dismissal."); *Pit River*, 30 F.3d at 1102 ("In this case, the [tribe's] interest in maintaining its sovereign immunity outweighs the [plaintiff's] interest in litigating its claim."); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) ("[L]ack of an alternative forum does not automatically prevent dismissal of a suit. Sovereign immunity may leave a party with no forum for its claims.") (citation omitted); *Wichita & Affiliated Tribes v. Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986) ("[T]he dismissal turns on the fact that society has consciously opted to shield Indian tribes from suit without congressional or tribal consent.").

124. See *Rydstrom*, *Validity*, *supra* note 20, § 12(a), at 58-59.

125. See *Rishell v. Jane Phillips Episcopal Mem'l Med. Ctr.*, 94 F.3d 1407, 1413 (10th Cir. 1996) ("The absence of an alternative forum would weigh heavily, if not conclusively against dismissal.")

declared absent tribes indispensable and have dismissed suits, leaving plaintiffs with no available forum in which to seek legal relief.

This unfortunate result was reached by the Tenth Circuit Court of Appeals in *Citizen Potawatomi Nation v. Norton*. Using the same mistaken analysis, employed by numerous other courts, the *Norton* court applied Rule 19 to bar a suit involving absent Indian tribes. After applying Rule 19(a) and finding that the tribes were necessary parties and that joinder was not feasible because of their sovereign immunity,<sup>126</sup> the court failed to consider whether the government's ability to represent the absent tribes' interests offset the prejudicial effect of a judgment entered in their absence. Therefore, the court mistakenly concluded that the tribes were indispensable under Rule 19(b).<sup>127</sup> As a result, the court affirmed the district court's dismissal of the action,<sup>128</sup> leaving the plaintiff with no forum in which to seek relief. The following section addresses the *Citizen Potawatomi Nation* decision.

### V. *Citizen Potawatomi Nation v. Norton*

#### A. *Facts and Procedural History*

Congress adopted the Indian Self-Determination and Education Assistance Act<sup>129</sup> in 1975 to provide for tribal self-governance. The Act authorizes the federal government to enter into compacts with tribes whereby the tribes receive federal appropriations and "assume comprehensive responsibility for the planning and administration of programs and services previously provided by the United States."<sup>130</sup>

In 1988, five tribes within the Shawnee Agency of the Bureau of Indian Affairs developed a formula to be used for dividing future federal appropriations among themselves.<sup>131</sup> The tribes "agreed to divide (1) twenty-five percent of the funding equally; (2) twenty-five percent in proportion to total tribal enrollment; (3) twenty-five percent in proportion to resident tribal enrollment within each tribe's jurisdictional area; and (4) [the remaining] twenty-five percent of the funds in proportion to the amount of trust property in each tribe's jurisdiction."<sup>132</sup> The U.S. Department of the Interior applied

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126. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999-1000 (10th Cir. 2001).

127. *Id.* at 1001.

128. *Id.* at 1002.

129. 25 U.S.C. § 450 (2000).

130. *Citizen Potawatomi Nation*, 248 F.3d at 995.

131. *Id.*

132. *Id.* at 996.

the formula to determine the amount of funding to award the tribes annually.<sup>133</sup>

In 1998, one of the tribes, the Citizen Potawatomi Nation (Citizen Potawatomi), brought suit in the Western District of Oklahoma<sup>134</sup> seeking a “mandatory injunction in the nature of mandamus” against the Department of the Interior and its officials.<sup>135</sup> The tribe challenged the methods used for computing the amount of funding that the Citizen Potawatomi received under the agreement.<sup>136</sup> Although the Citizen Potawatomi challenged four separate determinations made by the defendants, only two were significant to the court’s Rule 19 analysis: (1) “the determination that the . . . formula [was] static and [did] not change as the data change[d],” and (2) “the determination that the Shawnee Tribe and the Citizen Potawatomi share[d] the same service area and . . . the funds provided to that area.”<sup>137</sup> The other four tribes that signed the funding agreement did not participate in the suit. The “[d]efendants moved to dismiss the action” under Rule 19 “on the ground that the Citizen Potawatomi had not, and could not, join” the other four absent tribes “as parties to the action.”<sup>138</sup> The defendants argued that the absent tribes were necessary and indispensable parties and that the court should therefore dismiss the action under Rule 19.<sup>139</sup> The district court agreed and dismissed the suit.<sup>140</sup> The Citizen Potawatomi appealed.<sup>141</sup>

### *B. Holding and Reasoning*

The Tenth Circuit affirmed the district court’s decision, holding that the absent tribes were necessary parties and that joinder was not feasible.<sup>142</sup> The

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133. *Id.*

134. *Id.* at 995-96.

135. *Id.* at 995.

136. *Id.*

137. *Id.* at 996. The Citizen Potawatomi also challenged “the refusal of Defendants to fund certain items of the Citizen Potawatomi that [the] Defendants claim[ed] [were] residual . . . and the Defendants’ interpretation of [the] ‘moratorium’ clause” that allegedly stopped the Defendants from fully funding the Citizen Potawatomi. *Id.* However, these claims were not addressed in the court’s analysis under Rule 19 because the absent tribes did not have an interest in them. *Id.* at 1001. The Defendants did not meet “their burden . . . of ‘demonstrating the Tribe ha[d] an interest in [the] claim and that the Tribe’s ability to protect that interest [would] be impaired or impeded if the suit proceed[ed] in the Tribe’s absence.’” *Id.* (quoting *Davis v. United States*, 192 F.3d 951, 962 (10th Cir. 1999)).

138. *Id.* at 996.

139. *Id.*

140. *Id.* at 995.

141. *Id.*

142. *Id.* at 999-1000.

court also concluded that the absent tribes were indispensable.<sup>143</sup> Thus, the court dismissed the suit under Rule 19 even though dismissal meant that the Citizen Potawatomi had no forum in which to seek relief.<sup>144</sup>

### 1. Necessary Party Analysis

As to the Citizen Potawatomi's first claim, regarding the funding formula, the court concluded that the absent tribes were necessary under Rule 19(a) "[b]ecause the Citizen Potawatomis' action [could] alter the future funding for the absent tribes."<sup>145</sup> Therefore, the court held that the absent tribes could have claimed interests that were (a) related to the subject of the action,<sup>146</sup> and (b) legally protected because all of the tribes had agreed to the formula.<sup>147</sup> The court reasoned that, by entering into the agreement, each tribe transformed its interest in the funding decisions "from a mere expectation, which is unprotected, into an interest which is protected."<sup>148</sup>

The Citizen Potawatomi advanced two arguments supporting its contention that the absent tribes were not necessary parties: (1) the tribe was not challenging the use of the formula — only its implementation, and the absent tribes had no legally protected interest in receiving funds that were unfairly distributed;<sup>149</sup> and (2) the United States could adequately represent the interests of the absent tribes.<sup>150</sup> In support of the first contention, the Citizen Potawatomi cited *Makah Indian Tribe v. Verity*<sup>151</sup> and argued that the absent tribes were not necessary because they did "not possess a 'legitimate interest in continuing to receive funding allocations that are not fairly distributed.'"<sup>152</sup> The court dismissed this argument because it focused on the underlying merits of the litigation — whether the funds were unfairly distributed — a determination which was "irrelevant under [Federal Rules of Civil Procedure] 19(a)."<sup>153</sup> The court reasoned that if it were required to consider the underlying merits when determining whether the absent party possessed a

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143. *Id.* at 1001.

144. *Id.*

145. *Id.* at 997.

146. *Id.*

147. *Id.* at 998.

148. *Id.*

149. *Id.*

150. *Id.* at 999.

151. 910 F.2d 555 (9th Cir. 1990). In considering one tribe's action against the Secretary of Commerce challenging regulations that govern quotas on tribal ocean fishing, the *Makah* court held that the other tribes were not necessary to the action "because all of the tribes have an equal interest in an administrative process that is lawful." *Id.* at 559.

152. *Citizen Potawatomi Nation*, 248 F.3d at 998 (quoting Brief for Appellant at 15-16).

153. *Id.*

“‘legally protected interest,’” the Rule 19 analysis would become an adjudication on the merits.<sup>154</sup> The court reiterated that “‘Rule 19, by its plain language, does not require the absent party to actually possess an interest; it only requires the movant to show that the absent party ‘claims an interest relating to the subject of the action.’”<sup>155</sup> Therefore, the court held that Rule 19 excludes “only ‘those claimed interests that are “patently frivolous.””<sup>156</sup> The court concluded that the absent tribes’ claims defending the Department of the Interior’s funding method were not patently frivolous.<sup>157</sup>

Addressing the Citizen Potawatomi’s second argument, the court acknowledged that in some cases absent tribes are not necessary parties under Rule 19 because the federal government may adequately represent the tribes’ interests.<sup>158</sup> The court stated, however, that in such a situation the tribes are unnecessary parties “only so long as ‘no conflict exists between the United States and the nonparty beneficiaries.’”<sup>159</sup> The court concluded that the United States could not adequately represent the absent tribes because, if the Citizen Potawatomi prevailed in the suit, some of the absent tribes might gain funding and some might lose funding.<sup>160</sup> The court found that the interests of the absent tribes were “varied and potentially conflicting.”<sup>161</sup> Thus, the court held that the absent tribes were necessary parties to the Citizen Potawatomi’s first claim because the absent tribes could claim an interest in the application of the funding formulas and defendants could not adequately represent their diverse interests.<sup>162</sup>

As to the Citizen Potawatomi’s shared service area claim, the court also determined that one of the absent tribes was a necessary party under Rule 19(a).<sup>163</sup> There was no question that the Shawnee could claim a legally protected interest in the funding received for the shared service area.<sup>164</sup> However, the Citizen Potawatomi argued that the court previously ruled that the Shawnee did not share a reservation with the Citizen Potawatomi<sup>165</sup> and,

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154. *Id.* (quoting *Davis v. United States*, 192 F.3d 951, 958 (10th Cir. 1999)).

155. *Id.* (quoting *Davis*, 192 F.3d at 958).

156. *Id.* (quoting *Davis*, 192 F.3d at 959 (emphasis omitted)).

157. *Id.*

158. *Id.* at 999.

159. *Id.* (quoting *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996) (emphasis omitted)).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at 1000.

164. *Id.*

165. *Citizen Band Potawatomi Indian Tribe v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994) (holding that the United States had failed show that the Shawnee and the Citizen Potawatomi



thus, the two tribes did not share a service area.<sup>166</sup> In response to this argument, the court reasoned that, in its prior decision, it had held only that the United States had failed to meet its burden of showing that the Citizen Potawatomi and Shawnee shared a common reservation.<sup>167</sup> Importantly, the court did not hold that the United States could never meet this burden.<sup>168</sup> Therefore, the court found that the relevant issue of whether the Shawnee and Citizen Potawatomi share a common service area had not been conclusively decided; thus, the Shawnee's claimed interest in the funding received from the shared service area would not be "patently frivolous."<sup>169</sup> The court also determined that the United States could not adequately represent the Shawnee's interests because the U.S. interest in implementing national Native American policy differed from the Shawnee's interest in receiving the funds at issue in the case.<sup>170</sup> Thus, the court held that the Shawnee Tribe was a necessary party to the Citizen Potawatomi's shared service area claim because the Shawnee could claim a legally protected interest in the funding received from the shared service area, and the United States could not adequately represent that claimed interest.<sup>171</sup>

After determining that the absent parties were necessary to both claims, the court analyzed whether the absent tribes were indispensable. It was unnecessary for the court to analyze the feasibility of joining the tribes to the suit because the Citizen Potawatomi did not dispute that joinder was infeasible because of the tribes' sovereign immunity.<sup>172</sup> Thus, the court proceeded to determine whether the suit could continue in the tribes' absence or whether the tribes were indispensable.

## 2. Indispensable-Parties Analysis

"The Citizen Potawatomi argue[d] that, even if the absent tribes [were] 'necessary' [parties], they [were] not 'indispensable.'"<sup>173</sup> As a basis for its argument, the Citizen Potawatomi focused primarily on Rule 19(b)'s adequate

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had a common former reservation).

166. *Citizen Potawatomi Nation*, 248 F.3d at 999.

167. *Id.*

168. *Id.*

169. *Id.* at 999-1000.

170. *Id.* at 1000. The court cited *Manygoats v. Kleppe*, 558 F.2d 556, 558 (10th Cir. 1977), for the proposition that "[t]he national interest is not necessarily coincidental with the interest of the Tribe in the benefits which the . . . agreement provides. When there is a conflict between the interest of the United States and the interest of Indians, representation of the Indians . . . is not adequate."

171. *Citizen Potawatomi Nation*, 248 F.3d at 1000.

172. *Id.* at 997.

173. *Id.* at 1000.

remedy factor. The Citizen Potawatomi argued that an adequate remedy did not exist if the court dismissed the action and, accordingly, that it would suffer severe prejudice.<sup>174</sup>

The court acknowledged that, if the suit were dismissed, the Citizen Potawatomi would be prevented from pursuing its claim in “an alternative legal forum” because of the absent tribes’ sovereign immunity.<sup>175</sup> Additionally, the court found that no party could challenge the administrative decisions at issue in the case because only the tribes are permitted to do so.<sup>176</sup> However, the court concluded that the district court did not abuse its discretion in holding that the absent tribes were indispensable and that dismissal was required “even though the district court’s decision meant there is no way to challenge the conduct in question.”<sup>177</sup> In so holding, the court noted the “‘strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity,’”<sup>178</sup> the fact that “the absent tribes would suffer substantial prejudice if the action proceeded without them[,] and [that] there was no way to lessen that prejudice.”<sup>179</sup>

The *Citizen Potawatomi Nation* case is a prime example of the numerous cases in which courts apply Rule 19 to bar a plaintiff’s suit because a third-party tribal interest will be affected. Severe prejudice results because a potential plaintiff with a valid claim is denied a legal forum and prevented from seeking relief. As advocated below, the court should have factored the government’s ability to represent the absent tribes’ interests into its indispensability analysis. Additionally, the court could have employed alternative procedural mechanisms to better serve Rule 19’s interests.

## VI. Analysis

Rule 19’s drafters intended it to serve four individual interests: (1) the interest of the current plaintiff; (2) the interest of the current defendant; (3) the interest of the absentee; and (4) the interest of society “‘in the orderly, expeditious administration of justice.’”<sup>180</sup> However, as demonstrated by *Citizen Potawatomi Nation v. Norton* and most other cases discussed herein, the interests of the current plaintiff and society are rarely served. This is because, under courts’ current application of Rule 19 to cases involving absent

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174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 1001.

178. *Id.* (quoting *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999)).

179. *Id.*

180. *Tankersley v. Albright*, 514 F.2d 956, 965 (7th Cir. 1975) (quoting John W. Reed,

*Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 330 (1957)).

tribes' interests, courts dismiss suits and deny plaintiffs legal remedies because of the prejudicial effect that a judgment could have on the defendants and/or the absent tribes. Thus, when determining whether to dismiss, courts focus on (1) defendants' risk of incurring inconsistent obligations as a result of inconsistent judgments rendered by the current court and another court in a subsequent suit brought by an absent tribe and (2) the prejudicial effect that a judgment rendered in a tribe's absence could have upon the tribe's claimed interest. Such application is fundamentally unfair because it forces the plaintiff to bear the consequences of being denied a legal remedy. Thus, the current application does not serve the plaintiff's interest in obtaining a legal remedy or society's interest in resolving the parties' dispute, which are arguably more important than the interests of the defendant or the absent tribe. As Chief Justice Marshall acknowledged two centuries ago,

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. . . . "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."<sup>181</sup>

The remainder of this note proposes that courts can often better serve the interests of Rule 19 by (1) giving weight to the United States' ability to represent the interests of the absent tribe when determining whether to dismiss under Rule 19(b) and/or (2) employing other procedural mechanisms that could avoid the potential resulting prejudice to a defendant or an absent tribe when the court proceeds in the tribe's absence. Furthermore, if a defendant or tribe fails to invoke the procedural mechanisms and prevent the potential prejudice, courts can and should discount such prejudice in determining whether to dismiss or proceed under Rule 19(b). As such, courts can and should allow plaintiffs' cases to proceed and avoid the severe prejudice that results when plaintiffs are denied legal remedy. Indeed, by adopting the application proposed herein, courts can often serve all Rule 19 interests.

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181. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES \*23); *see also* *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66-67 (1992) (quoting *Marbury*, 5 U.S. (1 Cranch) at 163); *Bush v. Lucas*, 467 U.S. 367, 373 (1983) (same); *De Lima v. Bidwell*, 182 U.S. 1, 176-77 (1901) ("If there be an admitted wrong, the courts will look far to supply an adequate remedy.").

*A. Courts Misapply Rule 19(b) by Failing to Give Weight to the United States' Ability to Protect the Interests of Absent Tribes*

When balancing the four Rule 19(b) factors in cases involving Indian tribes as absent parties, courts have overlooked the federal government's ability and/or duty to represent and defend the absent tribes' interests. The first factor requires courts to consider the prejudicial effect of a judgment rendered in the party's absence;<sup>182</sup> however, the presence in the suit of a party with similar interests may offset any potential for prejudice to an absent tribe.<sup>183</sup> While the vast majority of courts have found that prejudice would result to an absent tribe,<sup>184</sup> these courts have failed to consider that the potential for prejudice is significantly reduced — if not eliminated — by the government's interest in defending its actions. The relationship between tribes and the United States is like that of “a ward to his guardian,”<sup>185</sup> and as the tribes' guardian, the United States can sufficiently represent tribal interests to offset the prejudicial effect of a judgment rendered in a tribe's absence.

In most cases, courts have deemed the United States' presence in the suit insufficient to render the absent tribes “unnecessary” parties under Rule 19(a);<sup>186</sup> however, the government's presence is relevant to a court's Rule 19(b) indispensability analysis. For example, in *Sac and Fox Nation v. Norton*,<sup>187</sup> the court concluded, in balancing the four factors, that an absent tribe had an economic interest in the government's actions being upheld and that prejudice would result if the plaintiff were to prevail.<sup>188</sup> However, the court properly acknowledged that “the potential of prejudice to that interest is offset in large part by the fact that the [government's] interests in defending [its] decisions are substantially similar, if not virtually identical, to those of the [absent tribe].”<sup>189</sup> Additionally, because the prejudice was minimal, the court concluded that it need not analyze the second factor, the availability of

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182. *Citizen Potawatomi Nation*, 248 F.3d at 1001.

183. *See, e.g., Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (holding that, even if a tribe were a necessary party, “the potential [for] prejudice to that interest is offset in large part” by the presence of the Secretary of the Interior and his interests in defending his actions). *See also Village of Hotveta Traditional Elders v. Indian Health Services*, 1 F. Supp. 2d 1022, 1030 (D. Ariz. 1997), which cited *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990), for the proposition that “the presence of a representative may lessen prejudice.”

184. *See supra* note 109.

185. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

186. *See supra* notes 104-05 and accompanying text.

187. 240 F.3d 1250 (10th Cir. 2001).

188. *Id.* at 1259-60.

189. *Id.* at 1260.

means to lessen the prejudice.<sup>190</sup> Therefore, while a potential intertribal conflict among absent tribes prevents courts from declaring tribes to be unnecessary parties, it does not, however, prevent courts from factoring the United States' representation of the absent tribes' interests into its Rule 19(b) indispensability analysis. If courts allow the suit to proceed and the governmental defendant prevails, the judgment will not affect the interests of the absent tribe; thus, the tribe is not prejudiced. Additionally, because the government's interests offset the potential for prejudice, the need for shaping relief or using other measures to lessen or avoid the prejudice is immaterial. Thus, if courts give proper weight to the government's ability to represent tribal interests in their indispensability analysis, the balance shifts against dismissal.<sup>191</sup> As a result, courts can deem the tribe dispensable, and allow the case to proceed.

Giving weight to the government's ability to represent an absent tribe's interests is one way to avoid dismissing plaintiffs' cases and denying them a legal remedy. However, as demonstrated below, other procedural mechanisms exist whereby federal courts can further the interests of Rule 19 and still adjudicate the present litigants' dispute.

### *B. Courts Overlook Procedural Mechanisms that Can Better Resolve the Problems that Rule 19 Is Designed to Prevent*

Federal civil procedure provides other mechanisms that can serve all Rule 19 interests in cases involving absent Indian tribes as necessary parties. If applied, these proposed mechanisms will allow courts to afford the existing parties a resolution of their dispute and avoid the prejudice that otherwise results to the existing parties and/or the absent tribes.

#### *1. Avoiding Prejudice to the Existing Parties*

Federal courts can avoid the severe prejudice suffered by plaintiffs simply by allowing cases to proceed rather than dismissing them under Rule 19. In doing so, courts can afford plaintiffs legal remedy. Additionally, after allowing a case to continue, courts can avoid defendants' risk of prejudice — the risk of incurring multiple or inconsistent obligations — through the

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190. *Id.*

191. The first factor — potential prejudice resulting to the absent tribe — is offset by the governmental defendant's presence, and the second factor becomes immaterial because the potential prejudice is either minor or nonexistent. The fourth factor — plaintiff's lack of remedy — always favors nondismissal because the tribes' sovereign immunity prevents the plaintiff from suing in any forum. Thus, when the court recognizes that the governmental defendant's presence in the suit can function to offset the potential for prejudice, the balance of the factors should weigh in favor of nondismissal.

following procedural mechanisms: (1) the government ability to interplead absent tribes<sup>192</sup> when applicable,<sup>193</sup> and/or (2) the courts' ability to retain jurisdiction over the lawsuit and to transfer and consolidate subsequent suits.<sup>194</sup>

*a) The United States' Ability to Interplead Absent Tribes*

When a U.S. governmental agency is sued regarding a specific asset of the plaintiff and one or more absent tribes, the government can involve the absent tribes in the suit through interpleader.<sup>195</sup> Interpleader is a mechanism by which defendants facing potential claims from more than one party on the same asset are permitted to counterclaim against all potential claimants, forcing them to participate in one lawsuit so that the court can determine all of their rights at once.<sup>196</sup> Indeed, interpleader serves the same interests as Rule 19 by seeking to avoid multiple, inconsistent obligations and to provide consistency and judicial economy.<sup>197</sup>

Although the tribes' sovereign immunity includes immunity from counterclaims and cross-claims,<sup>198</sup> the tribes cannot assert sovereign immunity against the United States<sup>199</sup> or any U.S. federal agency.<sup>200</sup> Therefore, the federal agency can interplead the absent tribes and avoid the risk of "incurring

192. See JAMES ET AL., *supra* note 14, § 10.19.

193. See *infra* notes 198-99 and accompanying text.

194. See *infra* Part VI.B.1.b, which proposes that, if courts retain jurisdiction over the present matter, subsequent suits brought by absent tribes can be consolidated under FED. R. CIV. P. 42. If the subsequent suit is brought in a different jurisdiction, it can be transferred to the original court under 28 U.S.C. § 1404 and then consolidated under Rule 42.

195. See Freer, *supra* note 1, at 1093-94 (stating that interpleader may be invoked in situations where the absentee is a potential claimant to a res held by the defendant). For a discussion on protecting the defendant when the absentee's interest is a potential claim that is not related to a specific res, see *id.* at 1096-1111, which proposes an amendment to Rule 19 and invokes "a statute mandating joinder on the basis of minimal diversity, allowing nationwide service of process, and relaxing venue restrictions."

196. JAMES ET AL., *supra* note 14, §10.19, at 637.

197. *Id.*

198. Wyandotte Nation v. City of Kansas City, Kansas, 200 F. Supp. 2d 1279, 1284 (D. Kan. 2002).

199. See *supra* note 87.

200. See Dawavendewa v. Salt River Project Agric. Improvement & Power Dist., 276 F.3d 1150, 1162 (9th Cir. 2002) (stating that "no principle of law 'differentiates a federal agency . . . from 'the United States itself'" and, therefore, tribal sovereign immunity cannot be asserted against the agency) (quoting EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1075 (9th Cir. 2001)).

double, multiple, or otherwise inconsistent obligations by reason of the [absent tribe's] claimed interest."<sup>201</sup>

*b) Courts' Ability to Reserve Jurisdiction over the Merits of the Original Lawsuit and to Transfer and Consolidate Subsequent Lawsuits Brought by an Absent Tribe*

Courts can also avoid defendants' risk of inconsistent obligations by retaining jurisdiction over the merits of the lawsuit. Such jurisdiction allows courts to transfer and consolidate most subsequent suits brought by absent tribes. Thus, courts can confine the litigation to one federal forum and render one judgment encompassing the rights of all parties.

Federal courts have the authority to retain jurisdiction over a case to resolve continuing disputes and to enter further orders as may be necessary to give effect to the judgment or to effectuate the parties' rights.<sup>202</sup> Moreover, this authority enables the federal courts to take action against the original parties and any new parties that can interfere with the judgment.<sup>203</sup> In fact, the courts'

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201. FED. R. CIV. P. 19(a)(2)(ii).

202. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3523 (1984); see also *Dugas v. Am. Sur. Co.*, 300 U.S. 414, 428 (1937) ("A [supplemental] bill may be brought in a federal court in aid of and to effectuate its prior decree to the end either that the decree may be carried fully into execution or that it may be given fuller effect . . . . Such a bill is ancillary and dependent, and therefore the jurisdiction follows that of the original suit, regardless of the citizenship of the parties to the bill or the amount in controversy.") (citations omitted). In *Riggs v. Johnson County*, 73 U.S. (6 Wall.) 166 (1867), the Court noted that "[t]he jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied." *Id.* at 171 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825)). Furthermore, the Court recognized that "[federal courts] have authority, therefore, from time to time, to alter the process in such manner as they shall deem expedient, and likewise to make additions thereto . . . ." *Id.* at 172 (quoting *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat.) 51 (1825)); see also *Bd. of Educ. v. Missouri*, 936 F.2d 993, 995-96 (8th Cir. 1991) (allowing court to retain jurisdiction in desegregation case to enter further orders necessary to effectuate the parties' rights and to provide a quality integrated vocational education system); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 880 (11th Cir. 1989) ("The [District] [C]ourt explicitly retained jurisdiction over the case . . . . Under this . . . jurisdiction, the court repeatedly has been asked to settle disputes concerning the application of the judgment . . . ."); *Hoffman v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976) (holding that the court does not lose jurisdiction to act if "new facts develop" and "additional . . . action by the court is required").

203. See, e.g., *Bd. of Educ. of Indep. Sch. Dist. 89 v. York*, 429 F.2d 66 (10th Cir. 1970) (enjoining couple, who was not a party to the original proceeding, from sending child to school across new boundaries established in original proceeding); *Castro v. Beecher*, 386 F. Supp. 1281 (D. Mass. 1975) (exercising ancillary jurisdiction over new defendants in plaintiffs' action to enforce the original judgment rendered in the case); *Miss. Valley Barge Line Co. v. United States*, 273 F. Supp. 1, 6 (E.D. Mo. 1967) (finding that the federal courts' power "to enter such orders as may be necessary to enforce and effectuate their lawful orders and judgments, and to

ability to retain jurisdiction has been recognized as “a common sense solution to the problems of piecemeal litigation that . . . arise by virtue of the limited jurisdiction of the federal courts.”<sup>204</sup>

By retaining jurisdiction over the merits and keeping the case on the docket, the court retains the ability to revisit its decision in the event that an absent tribe subsequently files suit against the defendant. If an absent tribe files suit in the same district court, the court can simply consolidate the cases under Rule 42.<sup>205</sup> After hearing the parties’ arguments, the court can render one decision that applies to all parties before it. If the absent tribe files suit in another jurisdiction, the defendant can have the case transferred to the original court under 28 U.S.C. § 1404.<sup>206</sup> The original court can then consolidate the cases and revisit its prior decision. Each tribe that files suit is deemed to have waived its sovereign immunity, thus empowering the court to exercise jurisdiction over such tribe.<sup>207</sup> Therefore, so long as the original court retains jurisdiction and keeps the case current on its docket, it retains the power to adjudicate the rights of the original parties and each absent tribe that subsequently files suit. As a result, the court can confine the litigation to one court and render only one judgment — administering complete relief for all of the parties.

Although courts cannot fully prevent “multiple litigation” because the absent tribes are still permitted to file subsequent suits, this threat is not a basis for dismissal under Rule 19. The Rule is designed to avoid the “risk of

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prevent them from being thwarted and interfered with . . . applies whether or not the person charged with the violation of the judgment or decree was originally a party defendant to the action”).

204. *N.Y. State Ass’n for Retarded Children, Inc. v. Carey*, 438 F. Supp. 440, 446 n.6 (E.D.N.Y. 1977) (quoting 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3523, at 58 (1975)).

205. *FED. R. CIV. P.* 42(a) provides:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

206. 28 U.S.C. § 1404(a) (2000) provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”

207. By initiating a lawsuit, tribes waive their immunity as to all claims, including defendants’ counterclaims that arise from the same transaction or occurrence that is the subject matter of the suit. *See Rupp v. Omaha Indian Tribe*, 45 F.3d 1241, 1244 (8th Cir. 1995); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). However, the tribe does not waive its immunity as to (1) claims that do not meet the “same transaction or occurrence” test; (2) claims of a different form or nature than that sought by the tribe; or (3) claims exceeding the amount sought by the tribe. *Id.*



incurring double, multiple, or otherwise inconsistent obligations,”<sup>208</sup> not multiple litigation.<sup>209</sup> Nonetheless, courts can still limit the expense and time associated with multiple litigation because only one court, entirely familiar with the case, adjudicates the entire dispute although it does so in phases by revisiting its original judgment each time a subsequent suit is filed.

Retaining jurisdiction over the merits of the case, however, will not eliminate the defendants’ risk of incurring inconsistent obligations in every situation. As discussed in greater detail below,<sup>210</sup> there are limits to the transfer mechanism that may prevent the consolidation of subsequent suits. First, if the federal courts do not have subject matter jurisdiction over the subsequent suit, the transfer statute<sup>211</sup> does not apply, and no court can transfer the suit to the original court that retained jurisdiction. In this situation, the absent tribe must sue in state court,<sup>212</sup> and there is no transfer mechanism that allows for transferring cases from state court to federal court.<sup>213</sup> It is unlikely that the federal courts will lack subject matter jurisdiction over the subsequent suit however, because most cases involve a federal question<sup>214</sup> or other basis for federal subject matter jurisdiction.<sup>215</sup> Secondly, even if the federal courts

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208. FED. R. CIV. P. 19(a)(2)(ii).

209. See *Boone v. Gen. Motors Acceptance Corp.*, 682 F.2d 552, 554 (5th Cir. 1982) (refusing to dismiss case because of the threat of inconsistent obligations and despite the threat of multiple litigation); see also *Delgado v. Plaza Las Americanas, Inc.*, 139 F.3d 1, 3 (1st Cir. 1998) (same).

210. See *infra* Parts VI.C.3-.4.

211. 28 U.S.C. § 1404.

212. If the tribe brings a subsequent suit in state court that is also within the federal courts’ subject matter jurisdiction, the case can be removed to federal court. See JAMES ET AL., *supra* note 14, § 2.31, at 155-56.

213. See James P. George, *Parallel Litigation*, 51 BAYLOR L. REV. 769, 897 (1999) (acknowledging that, although cases cannot be transferred from state to federal court, so long as the federal courts have subject matter jurisdiction over the claims, “removal to federal court readily achieves the same effect”).

214. Jurisdiction over federal questions is granted under 28 U.S.C. § 1331 (2000), which provides jurisdiction to the federal district courts in “all civil actions arising under the Constitution, laws, or treaties of the United States.”

215. In cases involving tribes as absent parties, federal subject matter jurisdiction can often be based on the following statutes: 28 U.S.C. § 1331 (2000), which grants jurisdiction to the federal district courts in “all civil actions arising under the Constitution, laws, or treaties of the United States”; 28 U.S.C. § 1346, which grants jurisdiction to the federal district courts in cases involving the United States as the defendant; 28 U.S.C. § 1353, which grants jurisdiction to the federal district courts in cases “involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty”; or 28 U.S.C. § 1362, which grants jurisdiction to the federal district courts in “all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United

will have subject matter jurisdiction, a court cannot transfer a case if the transferee court cannot exercise personal jurisdiction over the litigants or the transferee district is an improper venue.<sup>216</sup> This limitation may be problematic in some situations<sup>217</sup> because, if the tribe can prevent the transfer of a subsequent suit, the defendant is exposed to the risk of incurring inconsistent obligations. As such, neither the defendant nor the court can avoid such prejudice.

## 2. *Avoiding Prejudice to the Absent Tribes by Intervention*

When a court allows plaintiffs' suits to proceed in the absence of a necessary tribe, the tribe can avoid the potential resulting prejudice — the prejudicial effect on the tribe's legally protected interest of a judgment rendered in the tribe's absence — by exercising its right to intervene under Rule 24 of the Federal Rules of Civil Procedure.<sup>218</sup> "Intervention" is a procedure by which an absent party can enter into litigation commenced between others to protect its interests.<sup>219</sup> However, in doing so, the intervenor agrees to be bound by the judgment and is afforded standing to appeal if the judgment is adverse to its interest, regardless of whether the original parties choose to appeal.<sup>220</sup>

By recommending intervention as a mechanism that better serves Rule 19 interests, this note does not intend to attack tribal sovereign immunity. Rather, the analysis focuses on the current parties before the court. Rule 19 should not serve as a barrier that prevents the parties from obtaining justice simply because an absent tribe claims an interest in the suit but refuses to

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States." However, diversity of citizenship cannot serve as a basis for federal subject matter jurisdiction in cases involving Indian tribes. *See* *Am. Vantage Co. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (holding that neither the tribes nor their unincorporated entities can be sued in diversity because Indian tribes are not citizens of any state within the meaning of 28 U.S.C. § 1332(a)(1) (2000) and, therefore, the presence of a tribe destroys complete diversity).

216. *See* JAMES ET AL., *supra* note 14, § 2.33, at 160 (stating that transfer is proper only if "the defendants would have been subject to venue and service of process").

217. *See infra* Part VI.C.4.

218. FED. R. CIV. P. 24(a) provides:

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

219. *See* JAMES ET AL., *supra* note 14, § 10.17, at 626.

220. *Id.* § 10.17 & n.2.

participate. The rule's twin goals are complete resolution of the parties' dispute and avoidance of multiple or piecemeal litigation.<sup>221</sup> The rule recognizes, however, that situations exist in which an absentee's presence destroys the court's jurisdiction and renders joinder infeasible.<sup>222</sup> Rule 19 cannot, however, "in equity and good conscience"<sup>223</sup> contemplate allowing an absent third party that claims an interest in the suit to prevent the current parties from obtaining justice. Indeed, while the Rule certainly allows tribes to exercise their immunity and avoid the lawsuit, it allows the current "willing" parties to go forward. Furthermore, if the tribe wishes to participate and protect the tribal interests at stake, it can do so by intervening under Rule 24. Thus, intervention is a procedural mechanism that complements Rule 19 and allows courts to better serve Rule 19 interests.

Under Rule 24(a), an absentee has the right to intervene when a statute confers the right or when:

the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.<sup>224</sup>

Thus, the test for determining whether an absent party has the right to intervene is identical to the one used to determine if an absent party is a "necessary" party under Rule 19(a)(2)(i).<sup>225</sup> Further, unless the federal court's jurisdiction is based on diversity,<sup>226</sup> there are no barriers to the tribe's

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221. See *HB Gen. Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1198 n.9 (3d Cir. 1996).

222. See FED. R. CIV. P. 19(a) ("A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action . . .") (emphasis added).

223. FED. R. CIV. P. 19(b).

224. FED. R. CIV. P. 24(a).

225. See Freer, *supra* note 1, at 1078 & n.87.

226. Neither tribes, nor their unincorporated entities, can sue or be sued in diversity. See *Am. Vantage Co. v. Table Mountain Rancheria*, 292 F.3d 1091, 1098 (9th Cir. 2002) (holding that Indian tribes are not citizens of any state within the meaning of § 1332(a)(1) (2000) and, therefore, the presence of a tribe destroys complete diversity); *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 27 (1st Cir. 2000) (holding that "the presence of an Indian tribe destroys complete diversity" because "[a]n Indian tribe . . . is not considered to be a citizen of any state"); *Romanella v. Hayward*, 114 F.3d 15, 16 (2d Cir. 1997); *Gaines v. Ski Apache*, 8 F.3d 726, 729 (10th Cir. 1993); *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974) ("[I]t is clear that an Indian tribe is not a citizen of any state and cannot sue or be sued in federal court under diversity jurisdiction."). However,

intervention because supplemental jurisdiction will support it.<sup>227</sup> A tribe with the right to intervene clearly satisfies the U.S. Supreme Court's requirement that the claims arise "from a common nucleus of operative fact."<sup>228</sup> Therefore, if the court determines that a tribe is a necessary party under Rule 19(a), the tribe clearly has the option to intervene and protect its own interests.<sup>229</sup> If the tribe intervenes, the court can avoid not only the prejudice that may result to the tribe, but also the defendant's risk of inconsistent obligations by adjudicating the rights of all the parties in one action.

The interests of Rule 19 are better served if the litigants, tribes, and courts employ the procedural mechanisms proposed herein rather than simply dismissing plaintiffs' lawsuits. However, if the litigants fail to cooperate,<sup>230</sup> such procedural mechanisms are unable to prevent the prejudice that may

Indian tribes can incorporate themselves using one of two methods: (1) tribes can incorporate or charter a corporation under section 17 of the Indian Reorganization Act, 25 U.S.C. § 477 (2000), or (2) tribes can incorporate under their own tribal laws. See *Am. Vantage*, 292 F.3d at 1094 n.1 (9th Cir. 2002). Also, any subentity of the tribe can incorporate under local state law. *Id.* Consequently, once a tribe or subentity of the tribe incorporates, it becomes a "citizen" of the state in which it resides just as any other corporation. *Id.*

227. See 28 U.S.C. § 1367 (2000) (granting supplemental jurisdiction over all claims that "form part of the same case or controversy under Article III of the United States Constitution . . . includ[ing] claims that involve . . . intervention of additional parties"). The statute was enacted to clarify and consolidate the doctrines of ancillary jurisdiction, pendent claim jurisdiction, and pendent party jurisdiction. See JAMES ET AL., *supra* note 14, § 2.28, at 144.

228. See JAMES AT EL., *supra* note 14, § 2.28, at 145 (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). The full statement from *United Mine Workers* reads:

The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then . . . there is power in federal courts to hear the whole.

*Id.* (quoting *United Mine Workers*, 383 U.S. at 725). Furthermore,

[t]he statute was meant to restore the broader *Gibbs* concept of supplemental jurisdiction by extending jurisdiction to claims sufficiently related to those claims within the federal courts' original jurisdiction to fall within 'the same case or controversy under Article III of the Constitution,' that is, to press supplemental jurisdiction to its constitutional limits.

*Id.* § 2.28, at 146.

229. Naturally, the absent tribe must be notified of the pending litigation and its ability to intervene to protect its rights; otherwise, it cannot intervene and, therefore, would be denied the opportunity to protect its interests. Thus, once the court determines that the tribe is a "necessary" party, the court should order that the tribe be given notice of the pending suit and its right and opportunity to intervene. Upon expiration of an appropriate time period given for the tribe to intervene, for example, thirty days from the date of receiving notice, the court should proceed in the tribe's absence.

230. For example, the government fails to interplead an absent tribe, an absent tribe chooses not to intervene, and/or litigants prevent the transfer of a subsequent suit.

result to a defendant or absent tribe. As shown below, however, when these failures occur, the proposed mechanisms can function to identify the party responsible for the resulting prejudice and allow the court to discount such prejudice when determining whether to dismiss or proceed under Rule 19(b).

*C. When the Proposed Procedural Mechanisms are Available to the Party that May Be Prejudiced if the Suit Proceeds, Courts Should Discount that Factor When Determining Whether to Dismiss Under Rule 19(b)*

While the mechanisms proposed herein can resolve the majority of Rule 19 problems in cases involving absent tribes, four primary situations may still present problems: (1) the governmental defendant fails to employ interpleader when applicable; (2) the tribe refuses to intervene; (3) the federal court reserves jurisdiction, but the subsequent suit is outside the federal courts' subject matter jurisdiction; or (4) the defendant or tribe prevents transfer of a subsequent suit. In a majority of these instances, the party that may be prejudiced if the court proceeds is also the party that fails to employ the available procedural mechanisms to avoid such prejudice. Therefore, in such cases, a court could discount the potential resulting prejudice when determining whether to dismiss under Rule 19(b). If, after discounting such prejudice, courts determine that the factors weigh against dismissal, they should declare the absent tribe dispensable and allow the case to proceed rather than deprive the plaintiff of a legal remedy.

*1. The United States Fails to Interplead*

In cases in which the United States has the ability to interplead the absent tribes,<sup>231</sup> the government can protect its interests in avoiding the risk of incurring inconsistent obligations by requiring absent tribes to participate and defend their interests. However, in such cases, the government has a greater incentive to move for dismissal under Rule 19 rather than interplead the absent tribes because, if the court grants the motion, the government avoids the litigation altogether, and the plaintiff is forced to bear the consequences of being denied a legal forum. In such cases, therefore, courts should deny the Rule 19 motion and allow the case to proceed. Once the motion to dismiss is denied, the government will likely interplead the absent tribes and allow the court to adjudicate the rights of all parties in one suit. Interpleading the absent tribes is in the government's best interest because it avoids not only the risk of inconsistent obligations but also litigation expenses. Therefore, if the government interpleads the absent tribes, the court can discount the prejudice that may result if the plaintiff's case proceeds.

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<sup>231</sup> See *supra* Part VI.B.1.a.  
<https://digitalcommons.law.ou.edu/olr/vol56/iss4/4>

## *2. Absent Tribe Refuses to Intervene*

Rule 24 intervention only functions to eliminate the risk of prejudice to the tribe and the defendant if the tribe chooses to intervene. Absent an act of Congress, a court cannot force a tribe to intervene because intervention requires a waiver of sovereign immunity.<sup>232</sup> Indeed, if courts could force tribes to intervene under Rule 24, they could also force tribes to join under Rule 19. Thus, when a tribe claims immunity, intervention will not further Rule 19 interests. However, the tribe's sovereign immunity should not deny justice to the parties before the court. As stated above,<sup>233</sup> intervention is recommended as a complement to Rule 19 to allow courts to proceed in the tribe's absence and provide justice to the current parties. Although courts hold that the tribe's ability to intervene does not lessen prejudice when the tribe asserts its sovereign immunity and refuses to intervene,<sup>234</sup> courts should consider that the tribe can intervene if it so chooses. The current parties, however, do not have the ability to litigate their dispute in an alternative forum if the court dismisses the case. Thus, courts should be less concerned with the harm or prejudice that may result to the tribe and more concerned with the current parties' interest in litigating the dispute and society's interest in the administration of justice. When courts proceed in the tribe's absence, they can protect defendants' interests in avoiding the risk of inconsistent obligations by reserving jurisdiction over the merits of the case and utilizing the transfer and consolidation mechanisms discussed above.<sup>235</sup> Therefore, because the tribe possesses the ability to intervene, courts should discount the potential prejudice resulting from a judgment rendered in the tribe's absence when determining whether to proceed or dismiss under Rule 19(b).

## *3. Federal Court Reserves Jurisdiction but Subsequent Suit Is Outside Federal Subject Matter Jurisdiction*

The proposed transfer and consolidation mechanisms cannot serve the interests of Rule 19 if the subsequent suit brought by the absent tribe falls outside of the federal court's subject matter jurisdiction. In the absence of such jurisdiction, the tribes must bring such actions in state court and

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232. See *Pit River Home & Agric. Coop. v. United States*, 30 F.3d 1088, 1102 (9th Cir. 1994).

233. See *supra* Part VI.B.2.

234. See *Makah Indian Tribe v. Verity*, 910 F.2d 555, 560 (9th Cir. 1990) (stating that the tribe's ability to intervene is insufficient to lessen prejudice if it requires waiver of sovereign immunity).

235. See *supra* Part VI.B.1 a.

defendants are unable to remove to federal court.<sup>236</sup> Therefore, before determining whether to proceed or dismiss under Rule 19(b), courts should assess whether the subsequent suits will fall within federal subject matter jurisdiction. If not, then courts cannot discount the potential prejudice to defendants when determining whether to dismiss or proceed. However, if courts conclude that the subsequent suits will fall within federal subject matter jurisdiction, they should discount the resulting prejudice to the absent tribe or defendant because, even if the subsequent suit were originally filed in state court, the defendant can have the action removed to federal court and transferred and consolidated with the original action.<sup>237</sup> However, as discussed below, courts cannot discount the potential prejudice to the defendant in all cases because, even if the subsequent suit were removable, tribes can prevent transfer.

#### *4. Federal Court Reserves Jurisdiction but Tribe or Defendant Prevents Transfer of Subsequent Suit*

Although federal courts can protect the interests served by Rule 19 by retaining jurisdiction over the merits of the case and transferring and consolidating subsequent suits filed by the absent tribes, situations exist in which courts cannot transfer a case under 28 U.S.C. § 1404. This statute provides that federal district courts can transfer a case “to any other district or division where it might have been brought.”<sup>238</sup> Thus, transfer is improper if the transferee court (1) does not have personal jurisdiction over the litigants<sup>239</sup> or (2) is an improper venue.<sup>240</sup> However, the litigants themselves must raise objections to personal jurisdiction and venue.<sup>241</sup> Thus, the objecting litigant

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236. See JAMES ET AL., *supra* note 14, § 2.31, at 156 (stating that the jurisdictional requirements are applicable to removal and, therefore, that an action is removable only if it “would have been maintainable in federal court”).

237. If the controversy falls within the federal courts’ subject matter jurisdiction, then defendants can remove the case to federal court. See *id.* § 2.31, at 155-56. Once the case is removed, defendants can transfer the case to the original district where the court retained jurisdiction, unless the tribe prevents transfer by raising a personal jurisdiction or venue objection. Defendants are responsible for the risk of incurring inconsistent obligations if they fail to remove the case to federal court. For the procedures governing removal, see 28 U.S.C. § 1446 (2000). See also JAMES ET AL., *supra* note 14, § 2.31.

238. 28 U.S.C. § 1404(a) (2000).

239. See JAMES ET AL., *supra* note 14, § 2.33, at 160 (noting that defendants must be subject to service of process in transferee court or transfer is improper).

240. *Id.* (noting that venue in transferee district must be proper or district is not one in which the action might have been brought).

241. See FED. R. CIV. P. 12(h) (stating that defenses of improper venue and lack of personal jurisdiction are waived if they are not raised in the defendant’s answer or preliminary motion); see also JAMES ET AL., *supra* note 14, § 4.2, at 241 (stating that objections relating to personal

who prevents the transfer is responsible for the potential resulting prejudice. As a result, unless the original suit involves a tribe as the plaintiff or more than one tribe as necessary and indispensable parties, the courts cannot discount the prejudice that may result when determining whether to dismiss or proceed under Rule 19(b). The tribal plaintiff in the subsequent suit may, and likely will, object to transfer and expose the defendant to a risk of inconsistent obligations. Neither courts nor defendants will be able to prevent such risk of prejudice.<sup>242</sup>

It is clearly in defendants' best interests to waive their objections and to allow courts to transfer the case to the original district and prevent the risk of incurring inconsistent obligations.<sup>243</sup> However, the absent tribe will most likely have incentive to prevent transfer in the subsequent suit because, if the tribe had agreed with the original court's judgment, it would not have brought the subsequent suit. Thus, it is unlikely that the absent tribe will want the original court to adjudicate its subsequent suit. Therefore, unless the original court can be certain that it can exercise personal jurisdiction over the tribe and that its district is a proper venue for the subsequent suits, the court cannot discount that prejudice when making its Rule 19(b) determination because neither the defendant nor the court will be able to avoid the risk of inconsistent obligations.

If the case involves a sovereign plaintiff and/or more than one absent tribe however, the defendant can avoid the risk of incurring inconsistent obligations by moving to dismiss the subsequent suit under Rule 19 if the tribe prevents transfer. In such a situation, the sovereign plaintiff or other absent tribe from the original suit will be necessary and indispensable parties to the subsequent suit for the same reasons that the tribe was a necessary and indispensable party

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jurisdiction, venue, and service of process must be included in the defendant's answer or preliminary motions or they are waived forever).

242. If the case involves only one absent tribe and not a sovereign plaintiff, the defendant could not move for dismissal under Rule 19(b) because there is not an absent party whose joinder is infeasible. The plaintiff from the original suit is the only absent party that is necessary and indispensable and, unless the plaintiff possesses sovereign immunity, he cannot prevent joinder. In this situation, retaining jurisdiction over the original suit and amending its judgment to conform with the one rendered in the subsequent suit is the only way that the court can prevent the defendant from incurring inconsistent obligations. However, in this situation, there is no orderly, expeditious administration of justice. Therefore, unless the original suit involves a sovereign plaintiff or more than one absent tribe, courts cannot discount the prejudice to the defendant when determining whether to dismiss or proceed under Rule 19(b).

243. While the defendant likely will not have an objection on personal jurisdiction grounds because the transferee court must have had personal jurisdiction over him to have adjudicated the original suit, the defendant can conceivably object on venue grounds. If the defendant does so, however, he is responsible for the resulting prejudice — the risk of incurring inconsistent obligations.



to the original suit. Moreover, joinder will be infeasible because of sovereign immunity. Furthermore, when determining whether to dismiss, the court in the subsequent suit can discount the resulting prejudice to the tribe, such as being denied a legal remedy, when making its Rule 19(b) determination because the tribe had the opportunity to intervene in the original suit but failed to do so.<sup>244</sup> Consequently, the court in the subsequent suit can dismiss the case rather than expose the defendant to a risk of inconsistent obligations.<sup>245</sup> Therefore, in such cases, the original court can discount the prejudice that may result to the defendant when determining whether to dismiss under Rule 19.

In sum, unless (1) the original court is certain that the absent tribe cannot prevent the transfer of subsequent suits by objecting to personal jurisdiction or venue, or (2) the original suit involves a sovereign plaintiff or more than one absent tribe, the original court cannot discount the resulting prejudice to the defendant when determining whether to dismiss or proceed under Rule 19. In such circumstances, the court cannot serve the Rule 19 interests by reserving jurisdiction over the merits of the suit and employing the transfer and consolidation mechanisms because these mechanisms cannot avoid potential prejudice to defendants.

As demonstrated herein, situations may arise where a defendant or absent tribe fails to employ the suggested procedural mechanisms to eliminate the potential prejudice that may result if the case were to proceed in the tribe's absence. However, in these instances, courts can discount the resulting prejudice to the responsible party. By doing so, courts can allow plaintiffs' cases to proceed more frequently, and, as a result, better serve the Rule 19 interests.

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244. In fact, had the tribe intervened in the original suit, the subsequent suit would not exist and neither the defendant nor the tribe could incur any prejudice because the court would have adjudicated the rights of all parties in the original suit. By intervening, the tribe would have waived its sovereign immunity and agreed to be bound by the original court's judgment. Therefore, the subsequent suit would have been barred by *res judicata* and collateral estoppel. See *Am. Greyhound Racing, Inc. v. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002) (stating that absent tribes "are not bound by [the court's] ruling under principles of *res judicata* or collateral estoppel," unless they are parties to the suit).

245. Although such a result is exactly the sort that this note seeks to prevent — dismissing the suit and leaving the plaintiff without a legal remedy — in this situation, the plaintiff tribe is responsible for the court denying it a legal remedy because the tribe's objections prevented the court from transferring the case to the original court. By allowing transfer, the tribe could have avoided the defendant's risk of inconsistent obligations and would be able to continue with the suit.

*D. Looking Back at Citizen Potawatomi Nation v. Norton: An Application of the Proposed Procedural Mechanisms to an Actual Rule 19 Situation*

The following section of this note applies the suggested procedural mechanisms to the facts of *Citizen Potawatomi Nation v. Norton*. As demonstrated below, the Rule 19 application proposed herein will better serve the interests of Rule 19.

*1. The United States' Ability to Protect the Interests of the Absent Tribes*

When balancing the Rule 19(b) factors, the *Citizen Potawatomi Nation* court failed to give sufficient weight to the government's ability to represent the absent tribes' interests. Although the court properly acknowledged that the government could not represent the interests of each absent tribe so as to render the tribes unnecessary,<sup>246</sup> the government's interest in defending its actions was sufficient to offset the prejudice that could result to the absent tribes. In affirming the lower court's dismissal, the court relied on the "'strong policy favoring dismissal when a court cannot join a tribe because of sovereign immunity.'"<sup>247</sup> However, such "strong policy" is not so compelling as to eliminate the need to consider all four Rule 19(b) factors.<sup>248</sup>

Had the *Citizen Potawatomi Nation* court acknowledged that the government's presence would offset the potential prejudice, the balance of the factors would have weighed against dismissal. The potential for prejudice existed because, if the *Citizen Potawatomi* had prevailed, the "action [would have] alter[ed] the future funding for the absent tribes."<sup>249</sup> However, the court gave no weight to the fact that, if the case had proceeded and the Secretary of the Interior had successfully defended his actions, the administration formula would have remained the same, and the absent tribes would not have been prejudiced at all. Therefore, the Secretary's ability to defend his actions would have offset the potential prejudice to the absent tribes and, as a result, the first and second factors would shift against dismissal.<sup>250</sup> Additionally, the court itself acknowledged that the fourth factor — the absence of an alternative remedy — weighed against dismissal because sovereign immunity

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246. *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 999 (10th Cir. 2001).

247. *Id.* at 1001 (quoting *Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999)).

248. *See Davis v. United States*, 192 F.3d 951, 960 (10th Cir. 1999) (holding that, although there is a "strong policy that has favored dismissal when a court cannot join a tribe because of sovereign immunity," such policy does not abrogate the application of Rule 19(b)).

249. *Citizen Potawatomi Nation*, 248 F.3d at 997.

250. *See Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1259-60 (10th Cir. 2001) (finding that, because the potential for prejudice is offset by the government's presence, both the first and second factors weigh against dismissal).

prevented any party from challenging the Secretary's decisions.<sup>251</sup> Therefore, if the resulting balance of factors weighed against dismissal, the court should have declared the absent tribes "dispensable" and proceeded to adjudicate the Citizen Potawatomi's claim.

### 2. *The United States' Ability to Interplead the Absent Tribes*

In *Citizen Potawatomi Nation*, the Secretary of the Interior also had the ability to interplead the four absent tribes into the lawsuit. The government had appropriated a set amount of funds annually for the tribes' use in planning and administering the programs,<sup>252</sup> and the five tribes had negotiated a formula for the Secretary to use in determining how to divide the funds.<sup>253</sup> The formula divided 100% of the appropriated funds among the five tribes.<sup>254</sup> Thus, the government possessed a specific asset — the appropriated funds — to which one or more parties — the five tribes — claimed an interest. Therefore, the situation clearly satisfied requirements for invoking interpleader. Moreover, because the defendant was a federal government agency, the absent tribes could not have asserted their sovereign immunity to prevent the Secretary from interpleading them into the suit.<sup>255</sup> Consequently, the Secretary could have required the absent tribes to participate in the suit and eliminated the threat of prejudice to the absent tribes as well as his own risk of incurring inconsistent obligations.

### 3. *The Absent Tribes' Ability to Intervene*

Each of the four absent tribes in *Citizen Potawatomi Nation* possessed the right to intervene under Rule 24. The court specifically found that (1) the absent tribes claimed an interest in the subject of the action,<sup>256</sup> (2) disposition in the tribes' absence would impair that interest,<sup>257</sup> and (3) the Secretary could

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251. *Citizen Potawatomi Nation*, 248 F.3d at 1000 ("Clearly, sovereign immunity prevents the Citizen Potawatomi from pursuing these claims in an alternative forum. Moreover, if the Citizen Potawatomi cannot challenge Defendants' administrative decisions, then no one can.") (citation omitted).

252. *Id.* at 995.

253. *Id.*

254. *See id.* at 996 (stating that the tribes agreed to split 25% of the funds equally; 25% in proportion to total tribal enrollment; 25% in proportion to resident tribal enrollment within each tribe's jurisdictional area; and the remaining 25% of the funds were split in proportion to the amount of trust property in each tribe's jurisdiction).

255. *See supra* note 203 and accompanying text.

256. *Citizen Potawatomi Nation*, 248 F.3d at 997 (finding that the tribes had a legally protected interest in receiving funds as computed by the Secretary).

257. *See id.* at 1001 (finding that the Citizen Potawatomi's action may alter the funding received by the absent tribes).

not adequately represent the tribes' interests.<sup>258</sup> Indeed, it was for these reasons that the court deemed the absent tribes "necessary" parties under Rule 19(a).<sup>259</sup> Therefore, assuming that they were notified of the suit, the absent tribes clearly had the opportunity to intervene and defend their interests in receiving funding under the current formula applied by the Secretary. Had the tribes intervened, the court could have adjudicated the rights of all the parties and eliminated the potential for prejudice to the tribes and the risk of inconsistent obligations to the governmental defendant.

#### 4. *The Availability of the Transfer and Consolidation Mechanisms*

Had it allowed the Citizen Potawatomi's suit to continue in the other tribes' absence, the district court in *Citizen Potawatomi Nation* could have employed the transfer and consolidation mechanisms to protect the defendant from incurring the risk of inconsistent obligations. If the court had adjudicated the dispute and reserved jurisdiction over the merits of the case, it could have consolidated all subsequent suits brought by the absent tribes into the original action. If the absent tribes subsequently filed suit in the same district — the Western District of Oklahoma — the court could have merely consolidated the actions under Rule 42.<sup>260</sup> Alternatively, if the tribes subsequently filed suit in a different district, this district court could have transferred the case back to the Western District of Oklahoma under 28 U.S.C. § 1404,<sup>261</sup> where the court would have consolidated the case under Rule 42.<sup>262</sup> Furthermore, if the subsequent suits were filed in state court, the defendant could have removed the cases to federal court under 28 U.S.C. § 1446 because, as the court specifically acknowledged, federal subject matter jurisdiction existed under 28 U.S.C. § 1362,<sup>263</sup> which grants the federal district courts jurisdiction over "all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."<sup>264</sup> Thus, the federal court would have had subject matter jurisdiction over all subsequent suits brought by the absent tribes against the Secretary. Therefore, the Secretary could have removed the suits to federal court and,

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258. *Id.* at 999.

259. *Id.* (holding that the absent tribes were necessary parties because the "[d]efendants . . . sufficiently demonstrated that the absent tribes [could] claim an interest in the application of the funding formulas and that [d]efendants cannot adequately represent their varied interests").

260. FED. R. CIV. P. 42.

261. 28 U.S.C. § 1404(a) (2000).

262. FED. R. CIV. P. 42.

263. *Citizen Potawatomi Nation*, 248 F.3d at 995 ("Subject matter jurisdiction was asserted under 28 U.S.C. § 1362 in that the action was brought by an Indian tribe . . . and the matter in controversy arises under the Constitution, laws or treaties of the United States.").

264. 28 U.S.C. § 1362 (2000).

upon such removal, could have transferred the suits to the Western District of Oklahoma and had them consolidated. Furthermore, if the absent tribes had objected to the transfer on personal jurisdiction or venue grounds, the Secretary could have moved to dismiss the subsequent suits under Rule 19(b). The Citizen Potawatomi or any of the other absent tribes would have been necessary and indispensable parties to the subsequent suit because of their interest in the funding, and their sovereign immunity would have rendered joinder infeasible. After discounting the prejudicial effect that dismissal would have on the plaintiff tribe,<sup>265</sup> the court could have dismissed the subsequent suits and avoided the Secretary's risk of incurring inconsistent obligations. Therefore, the defendant or the absent tribe could have avoided any resulting prejudice, and the court could have discounted such prejudice and allowed the Citizen Potawatomi's suit to proceed. As such, the transfer and consolidation mechanisms could have better served the Rule 19 interests.

As demonstrated by the foregoing factual analysis of *Citizen Potawatomi Nation*, litigants and courts alike can employ the procedural mechanisms proposed herein to better serve the Rule 19 interests. Indeed, had the *Citizen Potawatomi Nation* court given proper weight to the federal government's ability to represent the interests of the absent tribes, the government invoked interpleader, the absent tribes intervened, or the court proceeded with the case, rendering judgment as between the current parties but reserving jurisdiction over the merits, all Rule 19 interests<sup>266</sup> would have been served: (1) the plaintiff could have pursued a legal remedy; (2) the defendant could have avoided the risk of inconsistent obligations; (3) the absent tribes could have defended their interests in the current administration of the funding formula; and (4) society would have had orderly, expeditious administration of justice.

### VII. Conclusion

Federal courts should change their application of Rule 19(b) in cases involving absent Indian tribes as necessary parties under Rule 19(a) as proposed herein. In many cases, courts can and should allow the suit to proceed rather than dismissing and forcing the powerless plaintiff to suffer all the consequences. By allowing the plaintiffs' cases to proceed, courts will be

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265. The court could discount the prejudicial effect that dismissal would have on the plaintiff tribe because the tribe (1) failed to intervene in the original suit and (2) is the objecting party that is preventing the suit from being transferred to the original jurisdiction where the suit could be litigated.

266. The rule serves three classes of interests: (1) the interests of the present parties, (2) the interests of potential but absent plaintiffs or defendants, and (3) society's interest in the orderly, expeditious administration of justice. See *Tankersley v. Albright*, 514 F.2d 956, 965 (7th Cir. 1975).

serving the interests of the present parties, society, and the absent tribes. Indeed, by adopting the application proposed herein, the courts can better serve all of the Rule 19 interests. Rule 19 cannot, “in equity and good conscience,”<sup>267</sup> allow an absent third party that claims an interest in the suit to completely prevent the current parties from obtaining justice.

*Nicholas V. Merkley*

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267. FED. R. CIV. P. 19(b).

